

SUPREME COURT. U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 471

ANTHONY M. PALERMO, PETITIONER,

vs.

UNITED STATES OF AMERICA.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

**PETITION FOR CERTIORARI FILED OCTOBER 24, 1958
CERTIORARI GRANTED DECEMBER 8, 1958**

OCTOBER TERM, 1958

No. 471

ANTHONY M. PALERMO, PETITIONER,

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**IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

UNITED STATES OF AMERICA, Plaintiff-Respondent,

—against—

ANTHONY M. PALERMO, Defendant-Appellant.

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

Appendix to Appellant's Brief—Filed May 15, 1958

**WYLLYS S. NEWCOMB,
165 Broadway,
New York, N. Y.**

**ROYALL, KOEGEL, HARRIS & CASKEY,
100 Broadway,
New York, N. Y.,**

**Attorneys for Defendant-Appellant,
Anthony M. Palermo.**

[File endorsement omitted]

[fol. 1]

[Title omitted]

DOCKET ENTRIES

Date

Proceedings

3-13-57—Filed indictment.

**3-19-57—Pleads not guilty—Bail fixed at \$2,500. Paroled
until 4 P. M. to give bail. Deft. ordered finger-
printed. Deft. allowed until 4-15-57 for motions.
Murphy, J.**

Date

Proceedings

- 3-19-57—Filed affidavits of Atty Wyllys S. Newcomb, Atty and Seymour Laskow certified Public Accountant dated 3-18-57.
 - 3-19-57—Filed notice of appearance of co-counsel Atty Wyllys S. Newcomb, 37 Wall St., NYC.
 - 3-19-57—Filed notice of appearance of co-counsel Attys Dwight, Royall, Harris, Koegel and Casky 100 Broadway, NYC.
 - 4- 9-57—Filed affidavit and notice of motion for an order for discovery and inspection pursuant to Rule 16 of the Fed. Rules of Criminal procedure. (Motion argued. Motion decided as indicated on the Court reporters record. 5-8-57. Walsh, J.)
- [fol. 2]
- 4- 9-57—Filed affidavit and notice of motion for a Bill of Particulars. (Motion argued. Motion decided as indicated on Court reporter's record. 5-8-57. Walsh, J.)
 - 5- 8-57—Filed affidavit of Eugene W. Harper, Special Agent, Intelligence Division, of the Internal Revenue Service in opposition to motion for discovery and inspection filed on 4-9-57.
 - 6- 4-57—Filed Transcript of record of proceedings, dated 5-8-57.
 - 6-26-57—Filed affidavit and notice of motion for an order under Rule 17(c) to copy and inspect documents.
 - 7- 3-57—Filed affidavit and notice of motion for an order under Rule 17(c) to Quash subpoena served on U. S. Attorney.
 - 8- 9-57—Filed Transcript of record of proceedings, dated 7-15-57.
 - 8-15-57—Defendant's motion to inspect and copy statements—Argued—Decision reserved.
 - 8-15-57—Government's motion to quash subpoena duces tecum—Argued—Decision reserved. Ryan, J.

Date Proceedings

- 8-16-57—Filed recognizance dated 3-19-57 for \$2500. Continental Cas. Co.
- 8-23-57—Filed affdt. and Order to Show Cause—Motion by defendant for leave to take deposition of Gloria Pollacci. Memo endorsed—Motion argued. Govt. neither objecting or consenting, the motion is granted. Settle order. Herlands, J.
- [fol. 3].
- 8-26-57—Filed opinion #23741. Motion to compel production is denied without prejudice to a renewal at the trial and the Government's motion to quash the subpoena duces tecum is granted. Dated 8-23-57. Bryan, J.
- 8-27-57—Filed order dated 8-23-57 ordering that the defendant is hereby granted leave to take the deposition of Gloria Pollaci, 20 Cabrini Blvd., NYC as a witness on behalf of the defendant. Herlands, J.
- 8-23-57—Memo endorsed on motion papers filed on 6-26-57. See opinion. Bryan, J.
- 9-17-57—Filed affidavit of Wyllys S. Newcomb, Atty for defendant dated 9-13-57.
- 9-20-57—Filed Government's Bill of particulars.
- 9-30-57—Filed affidavit of Earl J. McHugh, Assist. U. S. atty in reply to affidavit dated 9-13-57, submitted by Atty Wyllys S. Newcomb.
- 10-22-57—Filed affidavit of Earl J. McHugh, Assist. U. S. Atty in support of the Government's subpoena of the original draft income tax returns of the defendant prepared by Arthur R. Sanfilippo & Co., and now in the possession of defendant's trial counsel, Wyllys S. Newcomb and the Government's motion to inspect those documents pursuant to Rule 17(c) of the Fed. Rules of Criminal Procedure.

Date

Proceedings

10-24-57—Filed Transcript of record of proceedings, dated 3-19-57.

11-19-57—Filed Transcript of record of proceedings, dated 8-15-57 & 9-30-57.

[fol. 4]

12-27-57—Filed aff't. of Wyllys S. Newcomb, Esq. in opposition to Gov'ts motion for discovery and inspection and the subpoena of the original draft income tax returns of the Deft.

12- 2-57—Trial begun before Dimock, J. and a Jury.

12- 3-57—Trial cont'd.

12- 4-57—Trial cont'd.

12- 5-57—Trial cont'd.

12- 6-57—Trial cont'd.

12- 9-57—Trial cont'd.

12-10-57—Trial cont'd.

12-11-57—Trial cont'd.

12-12-57—Trial cont'd.

12-13-57—Juror #1 Marain F. Gressman sick. Trial adjourned to 12-16-57.

12-16-57—Juror #1 Marain F. Gressman excused by the court. No objection either side, and is replaced by Alt. Juror #1 David Cancaran who is duly sworn and becomes Foreman. Trial cont'd.

12-17-57—Trial cont'd.

12-18-57—Trial cont'd.

12-19-57—Trial cont'd.

12-20-57—Trial cont'd. Adj. to 12-26-57.

12-26-57—Trial cont'd.

12-27-57—Juror #5 ill. Trial adjourned to 12-30-57.

12-30-57—Trial cont'd and adjourned to 1-2-58.

Date

Proceedings

[fol. 5]

1- 2-58—Filed Transcript of record of proceedings, dated Dec. 16, 17, 18, 19, 20, 1957. Dec. 2, 3, 4, 5, 6, 9, 1957. Dec. 10, 11, 12, 13, 1957. Dec. 26, 27, 30, 1957.

1- 2-58—Trial cont'd.

1- 3-58—Trial cont'd.

1- 6-58—Trial cont'd.

1- 7-58—Trial cont'd.

1- 8-58—Trial cont'd.

1- 9-58—Trial cont'd. Deft. rests.

1-10-58—Trial cont'd. Govt. rests. Deft's motion to dismiss indictment Denied.

1-13-58—Trial cont'd. and concluded. Verdict Guilty on all three counts. Jury polled. Motion to set aside verdict denied. Other motions are reserved until date of sentence. Sentence 2-3-58. Pre-sentence report ordered. Bail cont'd. Dimock, J.

1-31-58—Filed Transcript of record of proceedings, dated 12-2-57.

2- 3-58—Deft's motion to set aside jury verdict—denied.

2- 3-58—Filed Judgment #62013. Two Years on counts 1-2-3 to run concurrently at a place of confinement to be designated by the Atty Genl. Deft. to pay costs of prosecution amounting to \$2729.20. Deft's motion for bail pending appeal Granted. Bail \$5000. Paroled to give bail. Dimock, J.

[fol. 6]

2- 3-58—Issued commitment and copies.

2- 3-58—Filed notice of appeal.

2-11-58—Filed affidavit and notice dated 1-28-58 and attached bill of cost.

Date

Proceedings

2-21-58—Filed Transcript of record of proceedings, dated Jan. 2, 3, 6, 7, 8, 9, 10, 13, 1958 & Feb. 3, 1958.

3-11-58—Filed stipulation—that the following matters may be omitted from the original papers to be transmitted by the Clerk of the Court to the United States Court of Appeals for the Second Circuit.

[fol. 7]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

ANTHONY M. PALERMO, Defendant.

INDICTMENT—Filed March 13, 1957

The Grand Jury Charges:

On or about the 14th day of March, 1951, in the Southern District of New York, Anthony M. Palermo, a resident of New York, New York, the defendant herein, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1950, by filing and causing to be filed with the Collector of Internal Revenue for the Third Internal Revenue Collection District of New York, a false and fraudulent income tax return, wherein he stated that his net income for said calendar year was the sum of \$18,939.51 and that the amount of tax due and owing thereon was the sum of \$5,507.48; whereas, as he then and there well knew, his net income for the said calendar year was the sum of \$41,627.09, upon which said net income he owed to the United States of America an income tax of \$17,835.93. (Section 145(b), Internal Revenue Code of 1939; 26 U. S. C. Section 145(b)).

The Grand Jury further charges:

On or about the 29th day of February, 1952, in the Southern District of New York, Anthony M. Palermo, a resident of New York, New York, the defendant herein, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1951, by filing and causing to be filed with the Collector of Internal Revenue for the Third Internal Revenue Collection District of New York, a false and fraudulent income tax return, wherein he stated that his net income for said calendar year was the sum of \$9,107.90 and that the amount of tax due and owing thereon was the sum of \$1,968.37; whereas as he then and there well knew, his net income for the said calendar year was the sum of \$25,076.57, upon which said net income he owed to the United States of America an income tax of \$9,661.94. (Section 145(b), Internal Revenue Code of 1939.)

Count III

The Grand Jury further charges:

On or about the 16th day of March, 1953, in the Southern District of New York, Anthony M. Palermo, a resident of New York, New York, the defendant herein, did wilfully and knowingly attempt to evade and defeat a large part of the income tax due and owing by him to the United States of America for the calendar year 1952, by filing and causing to be filed with the Director of Internal Revenue, Upper Manhattan District, New York, New York, a false and fraudulent income tax return, wherein he stated that his [fol. 9] net income for the said calendar year was the sum of \$18,291.69 and that the amount of tax due and owing thereon was the sum of \$5,625.09; whereas as he then and there well knew, his net income for the said calendar year was the sum of \$35,461.77, upon which said net income he owed to the United States of America an income tax of \$16,222.17 (Section 145(b), Internal Revenue Code of 1939).

Paul W. Williams, United States Attorney.

.....
Foreman

[fol. 10]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

No. Cr 152-189

UNITED STATES OF AMERICA,

v.

ANTHONY M. PALERMO.

JUDGMENT—February 3, 1958

On this 3rd day of February, 1958 came the attorney for the government and the defendant appeared in person and by counsel,

It Is Adjudged that the defendant has been convicted upon his plea of not guilty and a verdict of guilty by a jury, of the offense of wilfully and knowingly attempting to evade and defeat a large part of the income tax due and owing by him to the United States for the calendar years 1950, 1951 and 1952. (Title 26, Sec. 145(b) U. S. C. and Sec. 145(b) I. R. C. of 1939) as charged in counts 1, 2-3 and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It Is Adjudged that the defendant is guilty as charged and convicted.

[fol. 11] It Is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Two Years on each of counts 1, 2 and 3 to run concurrently. Defendant must pay costs of prosecution amounting to the sum of \$2729.20.

Motion by defendant for bail pending appeal granted. Bail fixed at \$5000. Paroled in custody of his attorney Mr. Newcomb, until bail is posted.

It Is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

E. J. Dimock, United States District Judge.

Herbert A. Charlson, Clerk.

[fol. 12]

IN THE UNITED STATES DISTRICT COURT

Excerpts From Testimony

OPENING STATEMENT ON BEHALF OF THE GOVERNMENT

Mr. Miller: * * * This, then, is the gist of the Government's case: that the defendant wilfully and knowingly evaded the payment of his income taxes received from stock transactions carried on in his own name or in the names of others, and primarily on stocks held personally. This constitutes the approximately \$56,000 of income understated; the approximately \$30,000 of income tax evaded.

Now, as I stated before, the Government will show that the defendant traded in his own name and in the names of others on the stock market. He bought and sold stock and received benefit from dividends and the sales of these stocks in the name of his mother, Mrs. Rosina Palermo. She is now deceased.

He also traded in the names of others. Some of these people will testify before you. You will discover that they are relatives of the defendant or that they are closely associated with him and are socially friendly with the defendant. You will be the judge of their testimony. We merely ask that you scrutinize their testimony carefully, keeping in mind that they are related to and are friendly to the defendant.

Now, the evidence in this case will show that the defendant's income tax returns were prepared by an accounting firm, Arthur R. Sanfilippo & Company.

Now, Mr. Sanfilippo, the senior partner of that firm, is a certified public accountant. He has been doing work for the defendant for the past 30 years. His firm keeps the books of the defendant's real estate companies and his

personally-held real estate property. In addition, his firm prepared the Federal and State income tax returns of this defendant. They prepared it on the basis of information supplied to it by the defendant.

[fol. 13] The Government will call Mr. Sanfilippo himself to testify. The Government will also call his partner, Anthony V. Amoruso, a certified public accountant.

You will also hear from other persons in the firm who worked on the defendant's tax returns. They will also be called by the Government.

Now, the evidence you will hear will establish that the Sanfilippo accounting firm was not paid for preparing the defendant's income tax returns; that the firm did this as a service and had done it for a number of years, as a service for this defendant.

The accounting firm did not conduct an audit of the doctor's complete personal financial transactions. They prepared these returns exclusively from figures submitted by the doctor with the exception of income from his real estate transactions where they worked on the books themselves.

Now, they would ask the defendant for his income from various sources and he would tell them. The defendant would also provide the accountant with some of the broker's statements primarily on the margin account statements. He would not, however, provide all of the statements, and this is what the evidence will show.

Further, the evidence will establish that in one or more of these years the defendant may have signed his income tax return in blank. They were then later filled in by the accountant. This occurred when the defendant went to Florida or California or Arizona with the New York Giants for baseball spring training.

Again the proof will show that the accountants may have committed certain errors in preparing these returns. Of course, the Government is not charging the defendant criminally with such errors.

The Government's evidence instead will establish that viewing the overall picture these errors were negligible in [fol. 14] the light of the full amount of money and of income in issue here.

At the close of this case we will ask you, the jury, to consider all of this evidence both of the blank returns and of the accountant's errors. We will ask you to consider it in the light of testimony by the accountants that they depended for their information as to the defendant's income upon the defendant himself; that he supplied whatever information he had.

Now, I would like to give one word of caution at this time. Arthur R. Sanfilippo, the senior partner of this accounting firm, will testify for the Government. He is a brother-in-law of the defendant, Anthony M. Palermo. He married the defendant's sister in 1925.

Mr. Amoroso, the other accountant, the other partner in this firm, has known the defendant since childhood.

Now we ask in this area also that you scrutinize their testimony carefully.

The Government cannot pick and choose the witnesses to a crime. We must call to the stand persons who are related to or are friendly with the defendant.

* * * * *

You will further hear evidence that despite this warning the defendant nevertheless continued his pattern of under-reporting income in the same manner as before, in the next year 1952.

Now, under our system of law the Government must in a case such as this establish wilfulness by the defendant. The legal meaning of this word, of course, will be given to you by the Court in its charge. The Government will prove that this defendant was wilful in his evasion and attempts to evade the payment of income taxes.

The Government will show that this was not a doctor dabbling in financial affairs on the side, in financial affairs [fol. 15] beyond his comprehension. The Government will show that this was a shrewd, an astute businessman who knew everything he was doing; who turned his stock market money into handsome profits over the years.

We will also show that he dealt in the names of other persons in these stock market transactions; that he concealed and did not report the income on this other money.

We will show further that this defendant knew full well what was required of him under the income tax laws.

Further, we will establish that he followed and maintained a consistent pattern of under-reporting substantial amounts of income; the same kind of income for the three indictment years and the two years preceding those three years.

We will further show that he consistently withheld data and information as to his income from his accountants, and the evidence to be put before you will clearly establish that all of this was part of a well-executed plan by the defendant carried out with the specific intention of evading the payment of his income taxes. That is what the Government will prove in this case.

We ask that you observe and pay heed to the witnesses who testify, to the documents that are received in evidence.

* * * * *

LEONARD MISHLER, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. McHugh:

Q. Mr. Mishler, by whom are you employed?

A. I am employed by the Appellate Division of the Internal Revenue Service.

Q. How long have you been so employed?

A. By the Appellate Division since 1954, March 1954.

Q. Prior to that were you also with the Internal Revenue Service?

A. Yes, I was.

[fol. 16] Q. In what job?

A. I was an Internal Revenue agent.

* * * * *

Q. Did there come a time in December of 1952 when you saw this defendant, Anthony M. Palermo?

A. Yes, I did.

Q. When was that?

A. It was December 16, 1952.

Q. Where did that meeting take place?

A. The meeting took place at the office of the office audit branch of the Audit Division of the Director of Internal Revenue, the Upper Manhattan District, located at 295 Madison Avenue, New York City.

Q. Would you tell the Court and jury, please, what happened on that day between you and the defendant?

* * * * *

A. Mr. Palermo came to my desk and seated himself at the chair—

Q. Was he alone?

A. Yes, he was.

Q. Were you alone?

A. Yes, I was. And I, for the first time, had an opportunity to look at the return which had been assigned to me. On opening—

Q. What return was that?

A. The return for the year 1951. I opened the return and I noticed that there was substantial amounts—a substantial amount of information forms, Form 1099 and 1087—

* * * * *

Q. What did you notice?

A. I noticed when I opened the return that there were a great number of these information forms attached to the return, associated with the return, and I test-checked a few of the information returns, the dollar amounts, which was the dividend totals for those respective stocks shown on the return, and I quickly noticed that the dividends which the information returns indicated as having been sent to the taxpayer were in excess of the amounts which were shown as dividends reported for those specific stocks.

[fol. 17] Q. When you say that you test-checked them, you mean you compared them?

A. That is correct.

Q. Proceed and tell us what happened next.

A. I asked the defendant what would be the reason for this, and he stated that it must be due to poor record keeping, and he didn't seem to be much concerned when I asked him that question. Then I went on—

* * * * *

The Court: Don't go on with that part. Just tell us what was said.

The Witness: In answer to my question he said that his gross income, his gross receipts from the medical practice, from his medical profession, was low, because he had a heart condition, and also he had a connection with the New York Giants Baseball Club which both took away from the time he could devote to his medical practice.

Q. What else was said?

A. I asked the taxpayer to bring in his books and records since he had come to our office without books and records whatsoever, and he told me to call his accountant, Mr. Arthur Sanfilippo; and thereupon he left.

Q. Do you remember anything else being said?

A. No, sir, I don't recall anything else being said.

Q. Was anything said about his 1952 return?

A. Yes, sir.

Q. What was said?

A. In going over the dividend portion and in following upon his remark that the difference I pointed out was due to bad record-keeping, I pointed out to him that it was fortunate as far as he was concerned that I was able to bring this to his attention in December 1951 before the 1952 return was filed, and that he would be able to take steps to correct any bad record-keeping and so report the correct amount of dividends for the 1952 year at least.

[fol. 18] Q. Just before, you said, "Bring it to his attention in December, 1951." Did you mean December, 1952?

A. Excuse me, December, 1952.

Q. That is when this conversation was taking place?

A. Yes, since the return for 1952 was to be filed by March 15, 1953.

Q. Do you recall anything else being said?

A. No, I don't.

Q. Did the defendant say anything about offering to pay his tax for any of those years, or specifically for 1951?

A. No, sir.

• • • • •
Cross examination.

By Mr. Newcomb:

• • • • •
Q. Did you see Dr. Palermo at any subsequent time?

A. No, sir.

Q. This was the only conversation you had with him?

A. The only conversation face to face, sir.

Q. Yes, that is what I mean.

A. That is correct, face to face.

Q. You worked on the case for some time thereafter?

A. Yes, I did, sir.

Q. But this was the only time that you interviewed or questioned him?

A. Yes. I interviewed him face to face, sir.

Q. Do you recall asking him about his accountants or what had happened with respect to them?

A. As I recall, at least the name of his accountant came up after I asked him to bring in his books and records, and then he asked me to call Mr. Sanfilippo, his accountant.

Q. And thereafter did you deal with Mr. Sanfilippo?

A. That is correct, sir. I called Mr. Sanfilippo.

Q. Mr. Mishler, did you keep a record of your appointments and interviews with taxpayers and representatives of taxpayers?

A. To some extent, sir.

[fol. 19]

New York, December 5, 1957,
10.30 o'clock A. M.

ARTHUR R. SANFILIPPO, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. McHugh:

Q. You are a certified public accountant, are you not, sir?

A. Yes.

Q. You know the defendant, Anthony M. Palermo, do you not, sir?

A. I do.

Q. How long do you know him?

A. Since about 1924.

Q. In fact, you are his brother-in-law, are you not, sir?

A. Yes.

Q. When did you marry his sister?

A. 1925.

Q. Did there come a time thereafter when you began to do accounting work for the defendant and his family?

A. Yes.

Q. When was that, sir?

A. For him personally I started it in 1944.

Q. Have you done any work for Anthony M. Palermo before 1944?

A. Just the preparation of tax returns.

Q. Both state and federal?

A. Yes.

.

Q. And formerly did you keep any books for the defendant, Anthony M. Palermo?

A. As I stated, from 1944 on, yes.

Q. In connection with what?

A. In connection with his real estate transactions.

Q. Did you keep books on his other transactions and affairs?

A. No.

[fol. 20] Q. Specifically did you keep books on his stock market transactions?

A. No.

Q. Did you keep books on his professional income?

A. No.

Q. Now, did you charge the defendant a fee for your services?

A. Yes.

Q. What fee did you charge him?

A. Well, I don't remember the early years. In 1950--

Q. Beginning with 1948, sir, what fee did you charge?

A. I believe it was somewhere around the same as in 1950, which was \$140 a year; and in 1951 and 1952 I believe we charged \$280 a year.

Q. What was that fee charged for, sir?

A. For accounting work in connection with the real estate transactions.

Q. What did you charge him for the preparation of his tax returns?

A. We did not make any charge for that.

Q. Did you prepare his federal tax returns?

A. Yes, sir.

Q. Income tax returns I am talking about.

A. Yes.

Q. And did you prepare his New York State income tax returns?

A. Yes.

Q. Now will you tell the Court and jury, please, what discussion you had with respect to the preparation of the defendant's income tax returns, fixing the time as exactly as you can?

A. Well, in the early years I would explain to him the taxability of certain items and what deductions were usually allowed.

Q. Well, would you give us a more definite period than the earlier years?

A. Well, I would say in the thirties or forties when we started going into those phases, he would go over those things in detail.

Q. Did you discuss dividend income with the defendant?

A. Yes.

Q. Did you discuss capital gains?

A. Yes.

• • • • •

[fol. 21] The Court: Tell us, if you can, when these transactions took place, and, as nearly as you can, what you said and what he said with respect to those matters. Tell us what was said as you recall it now.

The Witness: Well, when we first got preparing the tax returns we weren't aware whether he knew what income was taxable and what deductions were allowable.

The Court: You see, what we want is not what you were aware of but what he said and what you said. Now you were going to tell us about a conversation when these things started in the early thirties, is that it?

The Witness: Sometime in the thirties or early forties.

The Court: As best as you can recollect, what was the conversation?

The Witness: Well, I would ask him what income he had, and after he had told me what income he had, I would tell him what part of that was taxable, and I would ask him to give me all the expenses, so that we could determine which of those were deductible from that same income, and over the later years I didn't feel it was necessary because we had gone over it in the beginning.

Q. Did you have any discussions with the defendant concerning his mother, Rosina Palermo, insofar as tax consequences were concerned?

A. Yes.

Q. Would you tell the Court and jury what discussion you had and when, sir?

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The Witness: I can't fix the time exactly when we had these discussions but it was some time in the forties.

[fol. 22] Q. Will you tell the Court and jury what they were?

A. A discussion of whether he was entitled to a claim for dependency for his mother, and from my personal observation I thought most of the food and shelter and other personal expenses were paid by the Doctor himself, and also from the fact that he told me he was paying all the expenses, I thought that it was a proper deduction.

Q. What was a proper deduction?

A. The claim for dependency.

.

Q. Did he tell you anything about income in his mother's name?

A. No, not that I remember, except in a joking way, saying that he would tell his mother that he had made some money for her in the stock market.

Q. Would you fix the time and place of that, sir, to the best of your recollection?

A. It may have happened sometime in the late forties.

Q. Now after Agent Mishler came into the investigation

of this case—do you recall that in December of 1952 or early 1953?

A. Yes.

Q. Did you have other discussions with the defendant about Rosina Palermo and her income?

The Court: May I go back to this joking statement, that he made money for his mother in the stock market. Did you say that he told you that he had told her that?

The Witness: No, he would tell that—once or twice he would tell her that in front of me.

Q. Now, sir, would you go back to where we left off: After Agent Mishler came into the case did you have any other discussions with the defendant about Rosina Palermo and income in her name?

A. Not that I can remember other than just a vague recollection that the question had come up as to whether [fol. 23] he had any stocks or investments in his mother's name.

Q. In fact, wasn't there another discussion with him about that subject?

A. Just in a vague way, as I just mentioned.

Q. Isn't there anything more specific that you recall?

A. No.

Q. Do you recall that the defendant told you that he had told his mother he was trading in her name just to make her feel good?

A. Oh yes, I thought I had mentioned that before.

Q. Mr. Sanfilippo, do you recall any other discussions with the defendant after Agent Mishler came into the case about the subject of Rosina Palermo's income or investments or both?

A. Yes.

The Court: Tell us what conversation you had with the defendant on that subject.

The Witness: The conversation I had with him was that it was his income and he just put it in his mother's name to make his mother feel good.

Q. Would you please tell us what the defendant said again?

A. He said that that stock account or that income was in fact his account and he just traded in her name to please her and make her feel good because of her age.

Q. When he said that stock or income what stock are you referring to?

A. Stocks in the name of Rosina Palermo.

Q. And when did this take place, sir?

A. The discussion took place during the tax examination in 1953.

Q. At that time did you say anything to the defendant about the Rosina Palermo income?

A. Yes, I did.

[fol. 24] Q. What did you say?

A. I told him that as a result of this examination there was some undisclosed income found and wanted to know just how it came about.

Q. Anything else, sir?

A. Well, we also went into the question of getting some revised figures, if there were any errors made, and he told me that there were some errors made evidently and he would check his records.

Q. Who told you that, the defendant?

A. Yes.

Q. What I have asked you was if you had any other discussions with him about the Rosina Palermo income and what you said to him and what he said to you?

A. Just what I stated already.

Q. Did you ever say anything to him about the taxability of the Rosina Palermo income?

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Q. Did you, in fact, say anything to the defendant about disclosing Rosina Palermo's income, either dividends or capital gains or both?

A. Yes.

Q. When was that, sir?

A. During that same conversation I told him it was part and parcel of his gross income; in other words, any transactions he had in the name of Rosina Palermo were in fact his, and he understood that.

Q. Had you had any other discussions with the defendant that you recall about tax affairs?

A. Yes.

Q. Before we leave that, when was it that you told him that it was part and parcel of his gross income; was that after the examination?

A. During the course of the examination.

The Court: Do you remember in what year?

The Witness: 1953.

Q. Was it early or late in the year?

A. Early in the year.

Q. How early?

A. January—between January and April, I would say.
[fol. 25] Q. Sir, I had asked you before whether you had any other discussions with the defendant about tax affairs and I believe you said yes. Would you tell the Court and jury what they were and where and when they occurred?

A. We had conversations about tax matters almost every year in the preparation of his tax returns.

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Q. What was the substance of those conversations, as you recall?

A. He had given us the information for the preparation of the tax returns, with the exception of the real estate transactions portion of it.

Q. And that was the subject of your discussions?

A. Yes.

Q. Before we get into any specific discussion, did you have any other discussion with the defendant about tax affairs that you recall?

A. Yes.

Q. Tell the Court and jury what they were and when they occurred.

A. At one time there was a question of deductions discussed, specifically automobile expenses. And he handed me an article from the Medical Journal showing that automobile expenses were deductible in full in the usual case of a physician and doctor and—

Q. All right, continue with your answer.

A. Because of the fact that the automobiles were substantially all used in connection with his practice.

Q. And when did that discussion take place?

A. I imagine it was somewhere in the late '40s or beginning of 1950.

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Q. Mr. Sanfilippo, you said earlier, I believe, that you had discussed with the defendant both the subject of dividend income and capital gain income; is that right?

A. Yes.

.

[fol. 26] Q. Where did that discussion take place?

A. The discussion would take place each year with the preparation of the tax returns.

The Court: Suppose you try and remember what happened the first time it came up.

The Witness: The first time the conversation came up was with respect to what dividends were taxable and what were not; and I explained them.

By Mr. McHugh:

Q. When was that, sir?

A. Probably in the '20s. With respect to capital gains—

The Court: What did you say about the dividends?

The Witness: Well, I explained that some dividends were fully taxable, and there were some dividends, where they were payable in stock or in rights, or in others where they would get different treatment.

Q. When was the subject of capital gains discussed?

A. Capital gains was also discussed around that same time.

Q. When was that, in the '20s?

A. Some time in the '20s.

Q. Can you fix it any more definitely than that?

A. No. Late '20s; '25, '26, '27, '28.

Q. What was said, sir?

A. Well, the question was raised as to what portion of the income was taxable, and I would explain what the pro-

visions called for at that particular time; that they were partly taxable under a different procedure than ordinary income.

Q. Can you be more specific than that? Tell us, in the years 1948 through 1952 specifically, did you have any discussions with the defendant about capital gains, sir?

A. I don't remember explaining anything to him because I thought that by that time he knew the procedure, but, of course, we would go into the particular transactions and try to ascertain the amount of gains in each year to be reported; and in connection with those I would ask him for all the information, including the sales price, the date of sale and the purchase price and the date of purchase.

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Q. As to the defendant's professional income, in the year 1948 where did you obtain the figures for his professional income?

A. That would be submitted to us—from figures submitted by the defendant.

Q. He had different sources of professional income, did he not?

A. Yes.

Q. Tell the Court and jury what they were.

A. One of the sources of income was from an insurance company, and another—

.

Q. Was it the London Guaranty Company?

A. I believe it could be. And then there was another income from the National Exhibition Company, and the balance of the figures that he would give us in one gross amount would represent income from other patients.

Q. Would you tell us, sir, in 1948, or for the tax year 1948, where did you obtain the figure for the defendant's income from the London Guaranty Company?

A. We would get an information return.

Q. From whom?

A. From Dr. Palermo, from the defendant.

The Court: What was it that you got in a gross amount?

The Witness: The gross amount would be the amount of fees that that particular company paid to him during that year.

[fol. 28] The Court: You said before that the information was given to you in a gross amount and the balance of it would be what he got from his patients.

* The Witness: I see. Well, he would give us the gross amount of fees and then he would say of that amount so much was from the National Exhibition Company, so much from the information return that he had, and the balance would be the amounts from other clients and from other fees.

Q What year are you talking about?

A. 1948.

Q. How about 1949, where did you get your information with respect to his income from the London Guaranty Company?

A. The same way.

Q. In 1950?

A. The same.

Q. For the year 1951?

A. The same, except I don't remember whether there was any change in the name of the insurance company.

Q. For the year 1952?

A. The same thing applies there.

Q. Now how did you get the figures relating to the income from the National Exhibition Company or the New York Giants?

A. Verbally.

Q. In 1948?

A. Yes.

Q. You say "verbally," do you mean orally or in writing?

A. Orally.

Q. And that was given to you by whom?

A. By the defendant.

Q. In 1949 how did you get the figures relating to his income from the New York Giants?

A. The same way.

Q. For the year 1950 how did you get that figure?

A. The same way.

Q. For 1951?

A. The same way.

Q. And for 1952?

A. The same way.

Q. Now would you tell us for the year 1948 how you got the income for the defendant's private patients?

A. The amount would be given to us verbally, orally.
[fol. 29] Q. By whom?

A. By the defendant.

Q. You said "would be," but was it in fact given to you?

A. Yes.

Q. And in 1949?

A. The same thing applies there.

Q. And in 1950?

A. The same thing applies there.

Q. For 1951?

A. The same.

Q. And for 1952?

A. The same.

Q. Did the defendant submit any documents to you in all or any of those years relating to his income from his private patients?

A. I have a faint recollection that during the year of the examination, that is, during the early part of 1953, that we may have gotten an information return from the National Exhibition Company, or, at least, a letter or a form, showing the amount of salary paid to him for that year.

Q. Did he ever submit any other documents to you pertaining to his income from other private patients during those years, 1948 through 1952?

A. I didn't get that clear. Did you say information or documents?

Q. I meant information.

A. I see. With respect to documents, during the course of the examination in early 1953, we did receive diaries showing the income and expenses from his practice, which were used in connection with the examination by Mr. Mishler.

Q. Who gave you the diaries?

A. The defendant.

Q. For what year or years were those diaries?

A. I don't remember. There were several of them there. It covered, I think, the period of the examination. At first, I believe it was 1951 and then at a later date they included other years.

Q. Had you ever seen any of the defendant's diaries prior to the commencement of the tax examination?

A. Only on occasions where it would be open on his desk, without an examination of them.

[fol. 30] Q. Did he ever give them to you specifically at the time you were preparing his tax returns?

A. No.

Q. In those years?

A. No.

Q. And in no prior years?

A. No.

Q. Beginning in 1948, or for the year 1948—when I talk about these years bear in mind that when I say for 1948 you would be working on the tax return in 1949, is that right?

A. Yes.

Q. Beginning for the year 1948 where did you obtain the figure for the deductions and expenses that the defendant had in connection with his professional practice?

A. I would get them orally from the defendant.

Q. How did he communicate this to you, by the way?

A. Mostly by telephone and on occasions I would be in his private office at 145th Street.

Q. In 1949 where did you get those professional deduction figures from?

A. The same way.

Q. In 1950?

A. The same way.

Q. For 1951?

A. The same.

Q. For 1952 how did you get them?

A. The same way.

Q. Would you tell the Court and jury beginning in 1948 what information the defendant gave you pertaining to his stock transactions. First of all, will you begin with his dividend income?

A. The dividend income would be prepared or obtained by us from brokers' statements that he gave us.

Q. He gave you those statements?

A. Yes, and he would summarize in the statements submitted to us the total amount of dividends as well as the interest that appeared on any of those statements.

Q. You picked up the interest and brokerage fees from those?

A. Yes.

Q. Was that true in 1948?

A. Yes.

Q. 1949?

A. Yes.

Q. 1950?

A. The same thing.

[fol. 31] Q. 1951?

A. The same thing.

Q. 1952?

A. The same thing, except that we had additional information in 1952.

Q. You had additional information in 1952?

A. That's right.

Q. What additional information?

A. We had some additional form that was submitted to us showing dividends covering two years for the purpose of the examination by Mr. Mishler.

Q. Are you referring to the Steiner-Rouse forms?

A. I believe that's it.

Q. I show you Government's Exhibit 6 for identification and ask you to tell the Court and jury if you have seen that before?

A. Yes.

Q. When did you first see it?

A. During the course of the tax examination of Mr. Mishler in 1953.

Q. Who gave it to you?

A. The defendant.

Q. Were any of these other items attached to it when he gave it to you, sir?

A. No.

Q. How about the tapes that are now stapled to it, were they attached to it?

A. No, we put the tapes on ourselves.

Q. Whose writing is that on this tape at the left which bears the figures in 1951?

A. My writing.

Q. And the writing at the top of the tape bearing the date 1952, whose writing is that?

A. My writing, or it appears to be my writing.

Q. And whose writing or printing is that of the letters which are ticker symbols in the column here following the date column?

A. They appear to be the defendant's but I am not sure.

Q. Are you familiar with his writing?

A. Yes.

Q. How about the figures, whose figures are those?

A. They appear to be his.

* * * * *

[fol. 32] Mr. McHugh: I am asking about all of the figures following each date entry.

The Court: Date entry?

Mr. McHugh: Yes, your Honor, date entry.

Q. Whose figures are those, can you tell us?

A. They appear to be the defendant's.

Q. On both sides of the form, sir?

A. Yes.

Q. Now following the letters that are printed after each date entry, there is the name of certain companies written in very small handwriting. Is that the defendant's handwriting?

A. No.

Q. Do you know whose it is?

A. One of our staff.

Q. Do you know who specifically?

A. No, I don't.

Q. The same holds true for the handwriting after the other names after each date entry, sir?

A. Yes.

* * * * *

Mr. McHugh: I will offer it in evidence now.

Mr. Newcomb: No objection.

(Government's Exhibits 6, 6-A and 6-B received in evidence.)

(Government's Exhibit 6-D for identification received in evidence.)

By Mr. McHugh:

Q. Mr. Sanfilippo, before we got off on the subject of Exhibit 6, you were telling us that beginning in 1948 or for the year 1948 the defendant sent you some brokerage statements, is that correct?

A. Yes, sir.

Q. What kind of statements were they?

A. Well, it was a statement from the broker, or several [fol. 33] statements from the broker, I don't remember the name; it may have been Fox, O'Hara.

Q. To be specific, were they margin account statements or cash account statements or both?

A. Substantially I believe they were margin account statements.

Q. What do you mean when you say substantially?

A. All of the statements that we saw, as I remember, were margin account statements.

Q. How about the year 1949, did he send you brokerage statements then?

A. Yes.

Q. Were they margin or cash or both?

A. They were margin except that in connection with the substantiation of the cost of the stock sales at times there was offered to us a cash statement from the broker. Now, I don't know in any of these specific years that you mention so far that we did see a cash statement to substantiate the cost of one of these stocks.

Q. You say that a certain kind of statement was offered to you. Did you accept them when they were offered to you?

A. Yes, sir.

Q. For the year 1950 did the defendant send brokerage statements to you, sir?

A. Yes.

Q. What kind of statements?

A. Margin account.

Q. For the year 1951 did he send brokerage statements to you?

A. Yes.

Q. What kind of statements?

A. Margin account.

Q. For the year 1952 did he send brokerage statements to you?

A. Yes.

Q. What kind?

A. Margin account.

Q. Do you remember any cash accounts in any of those years?

A. Yes, in connection with the substantiation of the cost of sales, wherever he may have sold any stocks in any of those particular years we would at times have to resort to those statements to get the cost of them.

Q. When did you have to resort to those statements?

A. I cannot say definitely in what year that occurred.

[fol. 34] Q. In whose name were these brokerage statements that were sent to you in 1948?

A. In the defendant's name.

Q. 1949?

A. The same thing.

Q. For 1950 in whose name were they?

A. The same thing.

Q. For 1951 in whose name were they?

A. The same thing.

Q. For 1952 in whose name were they?

A. The same thing.

Q. Did he ever submit to you brokerage statements in anybody else's name other than his name beginning in 1948 right on through 1952?

A. Not that I remember.

Q. To be specific, did he ever in the years 1948 through 1952 give you any brokerage statements in the name of Rosina Palermo?

A. No.

Q. Did he ever give you any brokerage statements in the name of Rose J. Palermo?

A. No.

Q. In those same years did he ever give you any brokerage statements in the name of Catherine Brady or Catherine Shultz?

A. No.

Q. Now you have spoken about two kinds of dividend income. The defendant also had dividend income from another source, did he not, aside from margin accounts?

A. Yes.

Q. Would you tell the Court and jury what that was?

A. The income from stocks registered in his name would be given to us orally by him at the end of the year.

Q. Was that true in 1948?

A. Yes.

Q. Was that true in 1949?

A. Yes.

Q. Was that true for 1950?

A. Yes.

Q. Was that true for 1951?

A. Yes.

Q. Was that true for 1952?

A. Yes.

Q. When he gave you these figures orally on the stocks that he held in his own name, did he give you a breakdown as to the dividends that he received on different stocks or [fol. 35] did he give you a lump sum figure?

A. I believe he gave us a lump sum figure for all years possibly with the exception of 1952.

Q. For the year 1952 you had Exhibit 6?

A. Yes, I believe that was it, that was Steiner-Rouse.

Q. I again show you Government's Exhibit 6. Now at the time that you made up or your firm made up the defendant's 1952 income tax return, did you have Exhibit 6 in your possession?

A. Yes, sir.

Q. Would you tell the jury how you ascertained the figure for the defendant's capital gains beginning with the year 1948?

A. I am not sure whether there were any in that year or not, but if there were he would submit the details to us.

Q. What do you mean by that?

A. He would give us the sales price or the amount, the date of the sale, the cost and the date of purchase.

Q. Of each and every sale?

A. Yes, except that in some cases he would not remember the cost and in which case he would send us supporting information such as either a statement or a purchase voucher from the broker.

Q. Was that same practice followed in 1949?

A. Yes.

Q. Was the same practice followed for the year 1950?

A. Yes.

Q. And for the year 1951?

A. The same.

Q. And for 1952 was the same procedure followed?

A. The same thing.

Q. As far as capital gains are concerned you could pick up information pertaining to a number of his sales from the margin account statements submitted to you, could you not?

A. Yes.

Q. And you could pick up sales through that account?

A. Yes.

Q. And you could pick up purchases through that account?

A. Yes.

[fol. 36] The Court: When you say that he would not remember about the cost or the date of a purchase, how did you say he would supply it to you?

The Witness: By submitting either a purchase voucher that he may have obtained from the broker or a broker's statement.

Q. Beginning again in 1948, where did you get the information concerning the deductions that the defendant took for charitable contributions?

A. He would submit them to us verbally.

Q. You say verbally; do you mean orally or in writing?

A. Orally.

Q. Pardon?

A. Orally, yes, sir.

Q. And was that true in 1948?

A. Yes.

Q. And 1949?

A. Yes.

Q. And 1950?

A. Yes.

Q. And 1951?

A. Yes.

Q. And 1952?

A. Yes.

Q. Now beginning again in 1948, where did you obtain the deduction the defendant took for interest expense?

A. I am not sure as to the particular years, but it would be a combination; part of the interest with respect to the margin accounts would be obtained from the statements, as I have mentioned before.

Q. You mean the brokerage statements, sir?

A. Yes.

Q. What other source did you have, if any?

A. There, again, I am not sure whether this particular year was involved where he made some loans from a bank and he submitted the amount to us as a total figure for the year that he had paid to the bank covering interest.

Q. Would you spell that out for the Court and jury, please? How did he submit it and what year are you talking about?

A. I don't remember what particular year is involved [fol. 37] unless I have the returns before me; I cannot specifically remember the year that it took place.

Q. Mr. Sanfilippo, I show you Government's Exhibit 628 for identification and I ask you to tell the Court and jury what that is?

A. It is an office copy of the 1948 tax return of the defendant.

Q. Now, Mr. Sanfilippo, will you look at Government's Exhibit 629 for identification and tell the Court and jury what that is?

A. This is a photostatic copy of the office draft covering the tax return for the year 1949 of the defendant.

Q. Now, just to be clear, when you say the office draft, what do you mean by that?

A. It is the original form that we prepared from the information collected before typing the completed return.

Q. Now, will you look at that return, sir, and the papers that are part of that exhibit and see if anything there refreshes your recollection as to how you obtained the defendant's interest expense for the year 1949.

Just answer that question yes or no first.

A. Yes.

Q. What if anything in that refreshes your recollection?

A. The notation that—

Q. Well, just—

A. The interest notation.

(Government's Exhibit 629 for identification received in evidence.)

By Mr. McHugh:

Q. Now I direct your attention to a small slip of paper which is the sixth sheet down in Exhibit 629, sir, and I ask you whose writing is on that sheet?

A. My writing; most of it is, anyhow.

[fol. 38] Q. Well, would you tell the Court and jury what is your writing on that?

A. All except the \$1050.

Q. Well, they don't have it before them, so would you read those items, sir, that are in your writing?

A. Yes. We have the notation "Interest Paid." Under that we have "National \$30,000"—

Q. Now just a moment, sir. Do you know what that word and figure represents?

A. Yes.

Q. What?

A. Loan from the National City Bank in the amount of \$30,000.

Q. What else is written?

A. "3½ per cent interest," making a total of \$1050.

Q. Where did you get the figures pertaining to that loan that you just referred to?

A. From the defendant.

Q. How?

A. Orally.

Q. Now would you read the next items?

A. Corn Exchange—it says just "Corn—\$50,000."

Q. What did that mean, sir?

A. There was a \$50,000 loan from the Corn Exchange Bank.

Q. Where did you get those facts and figures?

A. Orally from the defendant.

Q. What else on that slip is in your writing, sir?

A. It has "—125 month," making a total of \$1500.

Then we have the word "brokers" with a question mark.

Q. Did you write that?

A. Yes.

Q. What meaning does that have?

A. That part we would probably have to determine from brokerage statements submitted.

Q. What else is in your writing on that sheet?

A. "Dividends earned \$5131; no stock sales; gross income fees"—

Q. Will you stop just a moment, sir. You said something about dividends?

A. Earned.

Q. And you read a figure, is that right?

A. Yes, sir.

[fol. 39] Q. Where did you get those facts and figures, do you know?

A. Submitted.

Q. By whom?

A. By the defendant.

Q. How?

A. Orally.

Q. All right, sir. What is the next statement?

A. No stock sales.

Q. Anything else on that little slip in your writing, sir?

A. Yes.

Q. What, sir?

A. Gross income fees.

Q. And a figure here—is that figure in your writing?

A. \$9581.

Q. Did you write that?

A. Yes.

Q. Where did you get those facts and figures?

A. Orally from the defendant. Expense \$4935.

Q. What is the meaning of that, sir?

A. That would be the total expenses for the year.

Q. And where did you get those facts and figures?

A. Submitted orally by the defendant.

Q. To you, sir?

A. Yes.

Q. Is there anything else on that, sir, in your writing?

A. The balance or the difference between the gross income from fees and the expense in the amount of \$4646.

Q. Does that complete the writing on that slip, sir?

A. Yes.

Q. Is there anything else in Exhibit 629 or on it that is in your writing, sir?

A. No.

Q. Mr. Sanfilippo, I show you Government's Exhibit 630 for identification and I ask you to tell the Court and jury what that is, sir?

A. It is a photostatic copy of the office draft, our office draft covering the year 1950 for the defendant.

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(Government's Exhibit 630 for identification received in evidence.)

[fol. 40] Q. Would you look at Government's Exhibit 630, Mr. Sanfilippo, and tell the jury if anything on that document is in your writing?

A. Yes.

Q. What, sir?

A. On the first page, my initials.

Q. Where do they appear?

A. At the upper righthand corner.

Q. What does that indicate, sir, if anything?

A. That I surveyed the draft.

Q. What do you mean by that, surveyed?

A. I would look over the return after it was completed by other members of my staff to check it generally for omissions or errors that would be disclosed to me by just a quick visual examination.

Q. Now, sir, will you examine the rest of that document and the papers attached to it and see if any of the others are in your handwriting, sir?

A. Yes.

Q. Mr. Sanfilippo, when we adjourned I believe you had just said that you recognized some more of your writing on Exhibit 630 in addition to the initials, is that right?

A. Yes.

Q. Will you tell us what other writing is yours.

A. This notation that says, "Include in income from fees."

Q. I am sorry, but I cannot hear you.

A. "Include in income from fees."

Q. Where is that written?

A. It is written in the copy of an information return from the London Guarantee & Accident Company. Is there any other writing on that exhibit that you recognize as yours?

A. No.

Q. Now, Mr. Sanfilippo, will you tell the Court and jury please how the draft returns were prepared in your office during the years you prepared them.

A. How they were prepared?

Q. Yes.

A. By my staff.

[fol. 41] Q. Tell the Court and jury how.

A. From information submitted to us by the defendant with respect to all items except the State income tax paid, which we obtained from the prior year's tax returns and with the exception of the real estate transactions that were shown on those reports.

Q. After the draft returns were prepared what was done with them?

A. They were surveyed by one of the principals, either myself or Mr. Amoruso.

Q. And then what was done?

A. Following which they were checked for computation, for computation errors, and thereafter the original was typed from this draft and sent out to the client.

Q. How many copies of the return were typed?

A. Just one.

Q. Just an original?

A. Yes.

Q. No copy?

A. No copy.

Q. Was that the practice with respect to all of your clients or just with respect to the defendant?

A. Substantially all the clients. There were a few who wanted copies of their returns and we would make them up in duplicate.

Q. Did the defendant request copies?

A. No.

Q. And you say they were sent out to the defendant?

A. Yes.

Q. Before they were sent out were they signed by anyone in your firm?

A. Yes.

Q. Start with 1950 and tell us when you got the information from the defendant.

The Court: I think the witness understands. Can you tell us when you got the information for the preparation of the 1950 return?

The Witness: The information for the real estate transactions we would receive throughout the year 1950; and summarized at the end of the year and the net results noted on the draft; the other data would be supplied to us by the [fol. 42] defendant at various times between January, 1951, and March of the same year.

Q. When did you receive your information data with respect to 1951?

A. 1951, for the time that I was in New York, we received up to that time, up to the end of January, with respect to the items other than from real estate, the real estate items

were also included or received during the year of the return or 1951.

Q. Now, you said up to the time that you were in New York. Do you mean that you left New York sometime in 1952, sir?

A. Yes.

Q. When?

A. I left from the end of January to April 20.

Q. Where did you go?

A. I went to California; to the branch office in California.

Q. Did you have all of the information for 1951 before that time?

A. No, I don't remember that we would have all of it at that time. I think most of it was received subsequent to that date.

Q. As to 1952, sir, would you tell the Court and jury when you got the information for that year.

A. With respect to the real estate we received it during the year 1952. With respect to the other items we received it somewhere between January and April or prior to the filing of the return of 1953.

Q. Now, sir, I believe—

The Court: Did it just come in in installments from the defendant; is that it?

The Witness: Yes, it would be received at various times.

The Court: How did he give you this information, did he come into the office?

The Witness: Mostly by phone.

[fol. 43] Mr. Newcomb: I am sorry, I did not get that answer.

The Court: "Mostly by phone."

The Witness: Occasionally I would drop into his office at 145th Street.

Q. During these years when you were doing these returns, 1950 to 1952, the defendant was senior physician for the New York Giants, was he not?

A. Yes.

Q. He was going away for spring training during those years, was he not?

A. Yes.

Q. When did he go?

A. Usually the latter part of February.

Q. To your knowledge, Mr. Sanfilippo, in 1950 did the Doctor, the defendant, supply all of the information for his return before he left?

A. Yes.

Q. For the year 1952 did he supply all of the information before he left?

A. Yes.

Q. You said in 1951 you were away, is that right?

A. Yes.

Q. Do you know of any case in which the defendant ever signed his income tax return in blank and left it with you or your firm?

A. Yes.

Q. What year was that?

A. I wouldn't remember what year but it was one of those three years.

Q. One of what three years?

A. 1950, 1951 or 1952.

Q. Do you know of any other year in which he signed the return in blank or left it with you or your firm or anybody else?

A. I am not sure, but I have a recollection that it did happen maybe once or twice before.

Q. Was it the practice to leave a signed blank of a return for every year or not?

A. No, it was not.

Q. And when in that year that you remember of 1950 to 1952 that he did sign the blank return and leave it with you, [fol. 44] did you advise him anything about his tax liability?

A. Yes.

Q. Mr. Sanfilippo, will you please tell the Court and jury what it was that was said to him or by him and when.

A. I cannot remember the language but—

Q. In substance.

A. In substance it was that the information that he gave us was more or less summarized, and after we arrived at

the tax based on the information submitted, I told him what the tax was, the amount of the tax.

Q. Did the defendant ever leave a signed blank check with you for his tax?

A. Yes.

Q. What year was that, sir?

A. I wouldn't remember what year that was.

Q. Was it in fact 1953, Mr. Sanfilippo?

A. It is possible.

Q. Can you say any more definitely whether that was the year or not, sir?

A. No, I have no independent recollection of the exact time that that happened.

Q. Do you know of any years in which the defendant left blank checks with his sister, Frances Pollaci?

A. Not that I remember.

Q. Did he ever do that to your knowledge?

A. I believe he did. I have a faint recollection of it.

Q. What year?

A. I wouldn't—I don't remember.

Q. Pardon?

A. I don't remember.

Q. Well, approximately when, sir?

A. It may have been between 1949 and 1952.

Q. Does that refresh your recollection as to when he left the signed blank return with you?

A. No.

* * * * *

Q. Now going back to when Agent Mishler came into the case, do you recall that, sir, the end of 1952 or early 1953?

A. Yes.

Q. Now I believe you testified, sir, that that is the first time you saw Government's Exhibit 6, is that correct?

A. Yes.

[fol. 45] Q. How did that come into your possession, sir?

A. It was given to us by the defendant.

Q. Did you ask for it or did he volunteer it?

A. We asked for a more accurate record of the dividends as a result of the examination, and the Doctor submitted this to us.

Q. What does that form show, sir?

A. It shows a listing of certain stocks with symbols noting a particular stock—the exchange symbol for the stock together with the name of the company that was put on there by our staff, and then the amount of dividends received on each one of two years, 1951 and 1952.

Q. And were those symbols, as you have called them, and the figures on that form when it was given to you, sir?

A. I didn't get that question. Would you mind repeating that, please?

Q. I say, were the figures and the symbols that you referred to, on the form when it was given to you?

A. Yes.

Q. And subsequently you have totaled the columns for each of those years, have you not, sir?

A. Yes.

Q. What total do you have there for 1951, sir?

A. \$16,269.78.

Q. What total do you have for 1952?

A. \$21,565.18.

* * * * *

Q. Do you still do the defendant's tax work?

A. No.

Q. Now in preparing the defendant's tax returns, did you audit his financial affairs in any year?

A. No.

Q. Do you do so for any of your clients?

A. Yes.

Q. When they request it or generally?

A. Generally in connection with the business concerns, such as a corporation or a person that is in business.

Q. Well, just restricting yourself now to individuals, do you audit any individual's affairs in connection with their tax returns?

A. Yes.

[fol. 46] Q. When they request it, or is this a general practice?

A. It is a general practice with that type of a client. If we have a client where we do a monthly audit or a detailed audit or an annual audit, following the completion of the audit we will prepare the tax returns.

Q. Is that the kind of work you did for Dr. Palermo?

A. No.

* * * * *

Q. Will you do that, Mr. Sanfilippo. Tell the Court and jury what you mean by the word "audit" in this context.

A. If we are called upon to give a certified statement we will have to make a detailed audit of the particular client following which we have a statement that is commonly known as a certified statement. A tax return prepared from that state of facts or from that result would be the type that you are inquiring about.

Q. Now going back to this blank return incident that you spoke about, at the time Dr. Palermo gave you this blank return—by the way, where did that occur?

A. I am not sure but I believe it was at his office, private office.

Q. Now, at the time he gave you that return did you show him anything?

A. I don't remember whether I showed him the figure or gave it to him over the phone.

Mr. McHugh: Will your Honor bear with me for a moment.

Q. I may have confused the record with this word "audit," but now that we have gone into it, Mr. Sanfilippo, will you tell us what clients—what individual clients now, not corporate clients—you did audits for in preparing your tax returns?

A. Do you want the names of clients?

Q. Can you specify the type of client, please?

A. Yes. They are commercial enterprises in the trading business; that is, buying and selling merchandise.

Q. Were there any in the same situation as Dr. Palermo?

A. No.

* * * * *

[fol. 47] Cross examination.

By Mr. Newcomb:

Q. Mr. Sanfilippo, did you or your firm, so far as you knew at the time you certified it, ever certify a return for Dr. Palermo which was improper?

A. Not of my knowledge.

Q. So far as you knew or were aware, any return signed by you was a proper return?

A. Yes.

Q. Did you ever certify a return of the Doctor's which according to your knowledge or belief at the time was inaccurate?

A. No.

Q. Did you ever sign or certify a return which, according to the information you had at the time, was incomplete?

A. No.

Q. I believe you have testified that you prepared the Doctor's tax returns from, I believe, back into the twenties, is that right?

A. Yes.

Q. Well, I direct your attention to the years 1945 to 1952 and I ask you this question: During any of those years was there any occasion upon which you certified a return for the Doctor although you knew or believed that your firm had insufficient data from which to prepare a complete and correct return?

A. Not to my knowledge.

Q. Well, the question calls for your knowledge, so that I take it that the answer to that question is no?

A. No—

Q. Did you ever tell the Doctor during any one of those years, 1945 to 1952, as to any of the returns for those years that your firm could not certify or prepare a proper and complete return from the records and data in the possession of your firm?

A. No.

The Court: Did you never have occasion to ask him for additional data?

The Witness: Yes, we did ask him for additional data from time to time.

[fol. 48] Q. During those same years, Mr. Sanfilippo, did the defendant ever tell you to omit any items of income from his returns which you thought should have been included in his returns?

A. No.

Q. During those years, namely, 1945 to 1952, did the defendant ever suggest that your firm should change any return which your firm had prepared for him?

A. Not that I remember.

Q. Did you, as to any of the years 1945 to 1952 inclusive, sit down with the defendant with a draft of the return, or the return in final form and discuss with him the items appearing thereon?

A. Yes.

Q. In what year?

A. 1952—up to the year 1952, and other years; I don't remember exactly what years they were.

* * * * *

The Witness: I don't think that is what I meant to say. I meant to say the year 1952 and other years prior to that. I don't know what years they actually were.

The Court: Are you talking about the return for the year 1952 or the return that was prepared in 1952?

The Witness: The return for the year 1952.

Q. Your statement to the jury is that with respect to the return for the year 1952 you sat down with the defendant with a draft of the return or the return typed in final form and discussed with him the items in the return?

A. Yes.

Q. And where, sir, did that take place?

A. I don't remember exactly. He was in our office once and it may have been during that period or it may have been at his office at 145th Street.

Q. Who else was present?

A. No one that I remember.

[fol. 49] Q. When in relation to the time that the return was filed would you say that that occurred?

A. My memory is it possibly took place some time around the middle of February, around the 14th or 15th of February, 1952.

Q. So that we may have no misunderstanding about that, when I said a draft of the returns I had in mind the form 1040. You know what that is.

A. Yes.

Q. In other words, it is a return such as I hold in my hand, and I am referring to Government's Exhibit 1.

A. Yes.

Q. That is what I am talking about. Did you have, in connection with the 1952 return, a filled-out form 1040 and sit down with the defendant and go over it?

A. I couldn't remember whether that was the draft itself or the figures shown on a piece of paper; in other words, we would arrive at the figures on a rough draft, in other words, a piece of paper first; and following that, if he were available—

Q. No, pardon me. I am sorry to interrupt you.

Mr. Newcomb: Your Honor, he was not being responsive.

Q. I am talking about a specific incident or instance with respect to a specific year, and I am talking Mr. Sanfilippo, about what actually happened as distinguished from what you say would happen. Now we are talking about the tax year 1952 and the return for that year. What I am trying to find out is whether it is your testimony that you had a form 1040 which had been filled out in pencil or otherwise for his 1952 return and went over it with him. Did you do that?

A. We would have a draft of a 1040 form or a computation on a piece of paper, either one or the other.

Q. Would you describe to me what you are referring to as a computation on a piece of paper?

A. It would contain all the figures that are normally entered on the tax return itself with the exception of the descriptive material such as names, addresses and so forth.

Q. You mean that you would have a piece of paper on which there would be perhaps 50 or 60 figures or one on which there would be perhaps only a few figures?

A. It would be all the figures that would be on the return. I don't know exactly how many figures there would be altogether. It depends on the particular return, and that particular return I don't have before me and I can't tell exactly how many figures there would be, but it would be all the figures that would be on that return.

Q. You are telling us that for the year 1952 you either took a filled-out form 1040 or a piece of paper with all the figures appearing on it and sat down with the Doctor and went over it with him?

A. Yes.

Q. Well, let us see the 1952 return. Do you have the 1952 return before you?

A. Yes.

Q. Would you tell the jury the exhibit number so that the record will be clear?

A. No. 3.

Q. Is it your statement that with respect to the 1952 return you sat down with the Doctor, and, for example, either had before you on a form 1040 or on a piece of paper, the figures showing the amount of his tax?

A. Yes.

Q. And the figures showing the amount of his dividends?

A. Yes.

Q. How long before the return was filed would you say that this occurred?

A. Roughly about a month.

Q. Do you recall this being done on any prior year or with respect to any prior year?

A. Not personally before me but it was discussed, discussed the same way over the phone. In other words, he would give me information and I would compute the tax and let him know what the tax would be.

Q. Did you discuss over the phone with him, for example, the figures relating to his real estate transactions?

A. Yes, in summary form.

[fol. 51] Q. And the figures relating to his capital gains and losses?

A. Yes.

Q. And dividends?

A. Yes.

Q. And, in short, all of the features or all of the material instances of income and deductions?

A. Yes.

Q. Would you say that happened every year?

A. Every year that I prepared his return, yes.

Q. Well, were there years when you did not prepare his return?

A. 1952, the 1951 return, I wasn't present at that time.

Q. I take it that when you sat down with him, when you told him about the details of his return, he never suggested any changes, did he?

A. In the final form, no. During the course of the preparation of the tax return there would be questions, yes, as to costs of the particular stocks that were sold and trying to establish a figure. Sometimes we would establish a cost for a particular stock and we found that it was the incorrect stock, the cost that we applied, and at a later date he submitted either the purchase memorandum or a statement to give us the exact cost.

Q. By the way, did you as to any of the defendant's returns for the years 1945 to 1952, ask for an extension of time to file his return?

A. Not that I remember.

Q. Do you know what a confirmation is?

A. Yes.

Q. You sometimes received that price or that document from the Doctor, did you not?

A. Yes.

Q. And there was a time, was there not, when he used to send you a good many of them; do you remember that?

A. Well, I wouldn't remember as to number how many, but there were times when he would submit several of them.

[fol. 52] Q. Was there a time when the Doctor used to send

you those regularly with respect to his transactions a good many years ago?

A. He would send a certain number. As to regularly, I don't know as to whether I could apply that phrase or not. He would submit it each year when we were trying to establish the cost of a certain stock that was sold.

Q. Did he in earlier years on occasion send them to you during the course of the year?

A. Yes.

Mr. McHugh: May we have something more definite than "earlier years," your Honor?

Q. In other words, there was a time when the Doctor sent down to you as he received them these brokers' confirmations, is that right?

A. Yes.

Q. During the course of the year, is that right?

A. Yes.

Q. And did there come a time when you told the Doctor that they were just cluttering up your office and that it was unnecessary for him to do that?

A. I don't remember the incident.

Q. Let's see if I can refresh your recollection. You said here a few moments ago that you were to get them when you needed to establish the base or the price of a stock that was sold?

A. Yes.

Q. And if the stock were not sold you did not need the confirmation, is that right?

A. That's right.

Q. The only ones which you needed or thought you needed was where you had a sale, is that correct?

A. That's right.

Q. But quite some years ago the Doctor would send you the confirmations during the year, is that right?

A. There were instances.

Q. Yes.

A. As to when that happened and how often, I don't remember.

[fol. 53] Q. Did he do that, namely, send them to you during the year, during the period or any portion of it, covered by the tax years 1945 to 1952?

A. I can't specifically remember any instance during that period and so I cannot definitely say yes or no.

Q. You can't say one way or the other?

A. No.

Q. Now did you, you or your firm, ever prepare a tax return or tax returns for Rosina Palermo?

A. Yes, I believe we did.

Q. Will you tell us approximately when that was.

A. Well, I believe it was prior to 1940.

Q. Now, did the defendant ever tell you during the period 1945 to 1952 that a return should be filed for Rosina?

A. No.

Q. Did he ever tell you during that period that a return should not be filed for Rosina?

A. No.

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Q. Mr. Sanfilippo, with respect to the tax year 1945, did the defendant tell you that dividends and capital gains on stocks in the name of Rosina should be included in his return?

A. Not that I remember.

Q. Did he tell you that they should not be included in his return?

A. No.

Q. For the year 1946, the tax year, did the defendant ever tell you that the dividends and capital gains on stock in the name of Rosina should be included in his return?

A. I don't remember.

Q. Are you telling the jury that you cannot tell us whether or not the defendant told you to include Rosina's dividends and capital gains in his own return?

A. I just can't answer that in a yes or no answer.

Q. Do you mean that he may have told you that?

A. I don't recall the conversation.

Q. Mr. Sanfilippo, do you remember the defendant ever telling you that you should not include Rosina in his returns?

A. No, sir.

[fol. 54] Q. Well, let's see. Is it fair to say that you have no recollection of whether he told you to include Rosina in his own or not?

A. My recollection is that all the dividend income he gave me would cover his as well as any nominee's stock. I considered his mother's stock as his and therefore I accepted that as part of the whole thing.

Q. Yes, but what I am trying to find out is the extent to which Rosina's stock was specifically discussed between you. Now do you understand that?

A. Yes.

Q. You are telling us that you assumed that whatever might be in Rosina's name was included in the figure he gave you?

A. Yes.

Q. Now I am asking you whether that was specifically discussed at any time.

A. Yes, it was discussed.

Q. When?

A. I can't place the exact year. It was in the latter part of the forties or the beginning of the fifties, as I remember.

Q. What was it and where did it occur?

A. That the stock that he had in his mother's name was in effect his and he just put it in her name to make her feel good, and he would tell her from time to time that he made money for her.

Q. Well, I would like to direct your attention to be perhaps a little more specific than that. Did he ever tell you that you were to include in his return any income that you might find in transactions in the name of Rosina?

A. He wouldn't put it that way, because he would give us the figures.

Q. Well, your answer then is no?

A. Yes.

Q. He did not tell you to include it?

A. I don't remember him mentioning specifically to include an item of dividends for his mother on his return, no.

Q. And I take it then that you do not recall his ever telling you specifically that you were not to include it, is that right?

A. No.

Q. Is that correct?

A. That's right.

[fol. 55] Q. For the tax year 1945, did your firm, as far as you can recall, have brokerage accounts for Rosina Palermo or in the name of Rosina Palermo?

A. Not that I remember.

Q. In 1946?

A. I believe I did see a schedule listing a certain number of shares of stock in her name.

Q. You are talking about one of your work-sheets?

A. Yes.

Q. I take it that you have seen that?

A. Yes.

Q. That was 1946. In 1947, how about that?

A. I didn't see any figures. I haven't seen a statement that year.

Q. Well, were you shown worksheets for 1947?

A. Well, I believe I was.

Q. By whom?

A. By the United States Attorney's office and before the Intelligence Division at 90 Church Street at the time of the testimony.

Q. When was the last occasion that you saw these work-sheets or any of them?

A. Sometime immediately prior to the testimony before the grand jury, and some of the work-sheets I believe I saw during the last six months in my office, within the last six months at my office.

Q. While you were here today, which I believe is December 5th, is it not—when did you last see any of your firm's worksheets? Did you see them yesterday, the day before, last week, within the past week? Have you seen them within the past week anywhere?

A. No.

Q. When was the last time that you would say you had seen any of your firm's worksheets?

A. About two months ago.

Q. Mr. Sanfilippo, did you at any time ever tell the defendant that your firm was not professionally qualified to prepare his returns?

A. No.

[fol. 56] Q. Did you for either of the years 1950, 1951 or 1952 personally examine your firm's files and records to see whether you had sufficient data to prepare a complete, correct and accurate return?

A. No.

Q. Did you instruct anyone in your office to make such an examination?

A. No.

* * * * *

Q. Mr. Sanfilippo, did you for any of the years, tax years, 1945 to 1949, personally make an examination or study of your firm's papers; records and files to determine whether they contained sufficient data and information to prepare a complete, accurate and correct return?

A. No.

Q. Did you instruct anyone in your firm to do so?

A. No.

Q. Did you personally, for the year 1952, know what records your firm had or did not have with respect to Dr. Palermo's tax affairs?

A. I remember that we had the diary showing the professional income during the period of the tax examination, bank statements and cancelled checks covering one or more years being examined—

Q. Excuse me, perhaps you misunderstood my question. My question was addressed to the 1952 return, and I think you have indicated by your answer that you were going to talk about the tax investigation.

* * * * *

Q. Mr. Sanfilippo, I am directing myself, your attention and that of all of us now to the preparation of the 1952 return. Do you understand that?

A. Yes.

Q. Now, did you at the time the return was prepared know yourself exactly what records your firm had and did not have?

A. Yes, I knew what records we had and what we did not have.

Q. Did you know at that time?

A. Yes.

[fol. 57] Q. I ask you the same question with respect to the return for 1951.

A. For the period of time I was here the answer would be the same—

Mr. Newcomb: May I have the answer read?

A. (Continuing) For the period of time I was in New York the answer would be the same, up to January 31—to whatever extent the preparation had been completed the answer would be the same as in 1952—as for the 1952 return.

Q. Did you know, for example, whether you had the Doctor's margin accounts or account?

A. No, I would not know for that particular year.

Q. Would you know whether you had the cash account or accounts?

A. No.

Q. Would you know whether you had the bank statements and cancelled checks or not?

A. Not subsequent to my leaving New York.

Q. Let me go at it a different way:

You were the senior partner?

A. Yes.

Q. What I am trying to explore at the moment is to the extent to which in the case of Dr. Palermo you personally would have knowledge during those years of exactly what data, information, records, brokerage accounts, bank statements and the like of the Doctor's that your firm had?

A. I wouldn't know exactly—I couldn't give you exactly a list of what we did have on hand. I can only give it to you in a general way.

Q. I think that may help us. Did you ever make up a list or have anyone in your firm make up a list of the data and records which you had?

A. No.

Q. Am I correct that there was no such list, for example, for any of the years 1950 to 1952, inclusive; is that right?

A. Yes.

Q. Yes, you had no such list?

A. We had no such list, that is right.

[fol. 58] Q. And is the same true of the years 1945 to 1949, inclusive?

A. Yes.

Q. I believe before the recess I was asking you whether your firm had brokerage accounts in the name of Rosina Palermo, and I started with 1945, and I think you said that you did not recall having any of her accounts for that year.

Then I asked you about 1946, and I think you said that you saw among your work papers some record or work papers indicating that your firm in that year did have a brokerage account or accounts for Rosina.

Do you remember that? A. Yes.

Q. Now let us go to 1947: did your firm have brokerage statements of Rosina Palermo for that year?

A. I don't remember.

Q. Did your firm have brokerage statements of Rosina Palermo for 1948?

A. I don't remember.

Q. 1949?

A. None to my knowledge.

Q. 1950?

A. No.

Q. I am sorry, don't just shake your head.

A. No, none to my knowledge.

Q. And 1951?

A. None to my knowledge.

Q. And 1952?

A. There is a question as to 1952. During the time of the examination we may have had some; I am not sure.

Q. No, but I am talking about in connection with the preparation of the return.

A. No—excuse me—the preparation of the tax return and the examination more or less happened at about the same time.

Q. Do you recall ever asking the Doctor to supply you with the statements of Rosina?

A. No.

Q. And I take it that you never asked him to supply them to you and were turned down?

A. No.

Q. Referring to the Doctor's own accounts—that is, the ones in his own name—did he ever tell you to ignore any one or more accounts in his name?

30
A. No.

[fol. 59] Q. During the years 1950 to 1952, inclusive, the tax years, were you generally aware of the fact that conditions in this country were prosperous?

A. I have no independent recollection at this time as to how they compared with the other years. They were more prosperous than earlier years as I remember them.

Q. Can you tell us whether during those years you were aware of the fact that most of the corporations, the great majority of the corporations listed on the stock exchange, both the New York Exchange and the American Exchange were regularly paying dividends?

A. Yes, a substantial portion were.

Q. Did your firm follow the practice of looking at last year's returns with respect to charities?

A. Not that I remember. We may have looked at some of the prior year's returns in connection with a question that may have been raised by the defendant. We would refer to it at that particular time.

Q. Mr. Sanfilippo, do you not know, as you sit there, that it was the regular practice of your firm in preparing the returns of the Doctor and your other clients for a given year to do as its very, very first act, the getting out of last year's returns and last year's files?

A. Yes.

Q. I ask you again, was it the practice of your firm with respect to charities to look at last year's return?

A. Yes, it would be our practice to look at that information along with all the other information on the prior year's return.

Q. If information was not readily available, did your firm sometimes with respect, for example, to deductions on [fol. 60] account of charitable contributions simply use the figure in the prior year's return?

A. Not that I can remember.

Q. Well, as a senior partner of the firm would you tell us that that never happened?

A. I am not in a position to answer as to never. I don't know if it could have happened. It did not happen while I was there.

Q. Now, from your accountant's standpoint, is it fair to say that in order to make up a tax return correctly and your client has a margin account, you know that you would have to have that margin account?

A. Yes.

Q. That is where you get interest, for example, monthly?

A. Yes.

Q. Dividends, long-term gains perhaps, short-term gains perhaps, is that correct?

A. Yes.

Q. Now I take it from your testimony of this morning that your firm had the Doctor's margin accounts every year, is that right?

A. Well, I cannot say that we had it every year. I remember substantially—

Q. Let us work back then. You had them for 1952?

A. Yes.

Q. 1951?

A. Yes.

Q. 1950?

A. Yes.

Q. 1949?

A. I am not sure of 1949.

Q. How could you prepare a return without a margin account?

A. Well, I am not sure whether we had the broker's statement or we had just the information.

Q. Are you suggesting to us, Mr. Sanfilippo, that the Doctor did the work of analyzing the margin account?

A. I am not suggesting that. I am just stating that I am not sure as to what years he submitted brokers' statements. We would have brokerage statements for most of the years for the purpose of arriving at the interest, expense [fol. 61] and the dividend income. Inasmuch as our practice was to get all the information from the defendant for

the purpose of dividends and capital gains, we don't make an examination, nor did we contemplate making a complete examination of the stock situation with respect to dividends or capital gains.

Q. Where would you get the broker's interest?

A. From the margin account; whatever statements were submitted to us.

Q. Where would you have to get the dividends or stocks in the street names held by the broker?

A. From the same statement, the brokerage statements that were submitted to us.

Q. Where would you get the long-term and short-term capital gains?

A. That would be submitted to us by the defendant and partially gotten from brokers' statements submitted for that particular purpose.

Q. Did you have the margin accounts in 1948?

A. I don't remember.

Q. Did you ever personally analyze the margin accounts for the doctor in your own office?

A. Not that I remember.

Q. Was that done by clerks?

A. Some members of the staff.

Q. You used an expression on your direct examination that I would like to explore. I believe it was when Mr. McHugh showed you the first of the returns, or, in any event, one of the returns, and asked you whether it was examined or reviewed by you and you used the phrase "visual survey." Do you remember that?

A. Yes.

Q. Tell the jury what you do when you make a visual survey of a tax return.

A. I look quickly to see if the name and address is approximately correct, the questions answered, the tax reflected and computed, and at all items that are indented at some place in the return are included in the grand total. [fol. 62] Q. Does this term "visual survey" as you used it include revisions of the details on the return?

A. No.

Q. Would it include, for example, anything more than a visual inspection of the return to see that the return was complete? Is that a fair statement?

A. Yes, to the extent of the real estate transactions, I would check the figures through the working papers that we would have on hand.

Q. Otherwise—

A. Otherwise I would not examine it except to see that whatever figures I had submitted were included in the return—if I got the figures myself, I mean.

Q. Oh, I see.

A. From the defendant.

Q. Are you indicating that where your firm was responsible for the figures, there you would check them back to the work sheets?

A. Yes.

Q. And your firm, you say, was only responsible for the figures with respect to the real estate transactions?

A. Yes.

Q. And those you would check back to the work sheets and the others you would not?

A. Yes.

Q. Do you recall any year in which you made any more of an extensive survey of the Doctor's returns?

A. In the year 1952.

Q. Other than that?

A. Well—

Q. Let us take 1950 or 1951. Did you make a more extensive survey in either of those years?

A. No.

Q. As far as you recall, did you make a more extensive survey in any of the earlier years?

A. No.

Q. Namely 1945 to 1949, inclusive?

A. No.

Q. In your direct testimony, when you were talking about capital gains and losses, I recall you saying that the Doctor would give you the information as to the cost, acquisition date and the like. Do you remember that?

A. Yes.

[fol. 63] Q. And you used the phrase that cash statements were "offered" to you. Do you remember using that phrase?

A. Yes.

Q. Well, did you ask for them?

A. No, we did not specifically. We asked for the supporting information, the information we required, in other words, the cost of the particular stock that was sold.

Q. Well—

A. And he would submit these statements, included in which sometimes were some cash statements.

Q. So that we can all understand this, when you as an accountant, in preparing a return, had in your possession knowledge for an account that 100 shares of RCA were sold during the tax year, then you know you have got a taxable—you have got an item that must be covered in the tax return?

A. Yes.

Q. Wherever you have a sale, from an accounting tax standpoint, you as an accountant know that you have got a transaction which if it is not covered in the return, the return is incomplete, is that correct?

A. Yes.

Q. And when, I take it, that you found such transactions, you would obtain from some source the necessary information to permit you to include it properly on the return, is that correct?

A. Yes.

Q. Then there is another place that you could get it from. You could get it by calling the Doctor's broker with the Doctor's permission, is that right?

A. Not always. In many cases the brokers will not give you information directly without an authorization, a written authorization.

Q. Well, I am talking about the Doctor and the Doctor's brokers, not in generalities. The Doctor dealt with Fox, O'Hara for years, is that correct?

A. Yes.

Q. And I think one of their representatives has testified that he was a good customer of theirs. Didn't it happen [fol. 64] to your knowledge that your firm in order to get the necessary information during the tax years 1950, 1951 and 1952 called Fox, O'Hara direct with the Doctor's per-

mission in order to get the information to report on the Doctor's return?

A. I remember instances where we were to call them to get information.

Q. Where you would or your firm would?

A. That's right.

Q. For those years?

A. Yes.

Q. And wouldn't it sometimes happen in the prior years 1945 to 1949?

A. I don't remember any specific instance, but it is possible that it could happen.

Q. I believe you testified that it was the Doctor's practice and your practice for him to tell you or give you his dividends in a "lump sum." Do you remember that?

A. Yes.

* * * * *

Q. Well, let us be specific. I take it that that was not true as to 1952?

A. No.

Q. Was it true as to 1951?

A. I am not sure about 1951.

Q. Was it true in 1950?

A. There was a point at which a detailed statement was required. If 1951 is the year that that change was made, then we probably would get it. In the year 1951, I am not sure.

Q. I thought your testimony was clear. Did you get any in a lump sum or didn't you?

A. We would get it in a lump sum for all years except 1952 and possibly 1951.

Q. All right. I will come back to 1951. Let us clear up any possible misunderstanding. In 1950, am I correct that your testimony is that you got the Doctor's dividends from the Doctor in a lump sum?

A. Yes.

Q. In 1949, is that true?

A. Yes.

Q. In 1948?

A. Yes.

Q. And so on back to 1945?

A. I don't remember the other years, but generally that is true.

Q. Do you remember in 1946 or 1947 a change instituted?

A. No, I don't.

[fol. 65] Q. Is this accurate: That up to the time when you had to itemize, when your firm was trying to have to itemize, you got it in a lump sum?

A. Yes.

Q. And you are not sure whether that was in 1951 for the first time or 1952?

A. That's right.

Q. I show you Exhibit 6, which is what has been called the Steiner, Rouse sheets or cards, and you will see that for 1951 it does not give the dividends in a lump sum but it gives them item by item; do you see that?

A. Yes.

Q. Was this the first such list that you ever saw?

A. I am not sure. This was submitted during the course of the examination and is not indicative of the amount of what was reported in the 1951 return. With reference to this portion of it marked 1951, it was not on hand at the time the 1951 return was prepared. Now it is possible that we did get a breakdown during the preparation of the 1951 return, not this, which would be at an earlier date than this particular exhibit.

Q. I am talking about a list of dividends as distinguished from a lump sum. This is a list of dividends.

A. Yes.

Q. You just told us that in the earlier years you got the dividends in a lump sum orally?

A. Yes.

Q. I am not asking when you got this, namely, Exhibit 6. I am asking you if it is the first itemized list of dividends that you ever got from the Doctor?

A. I am not sure that it is.

Q. Well, did you get such an itemized list for 1951?

A. That is the one I am doubtful about. We may have

received a list or a breakdown for the year 1951, that is, for the preparation of the return for 1951.

Q. Now, does that refresh your recollection—

A. Yes.

Q. —that the first itemized list of dividends that you ever got from the Doctor was for 1951?

A. Yes, sir.

[fol. 66] Q. And you got none since 1950 or the prior years, is that correct?

A. That is correct.

Q. Do we have it now established that for 1950 and prior years the practice was for the Doctor to give orally a lump sum figure for his dividends, is that correct?

A. Yes.

Q. And you say he would do that some time between the beginning of January and the filing date of March 15th, is that correct?

A. Yes.

Q. I think in fairness I ought to remind you that I think you testified that he gave you that before he went to Florida—I am sorry, before he went to Arizona or away on spring training, is that right?

A. Yes. I believe my memory is that I said sometime from January to the middle or end of February.

Q. I stand corrected. What sticks in your mind, I take it, is his going away with the baseball team?

A. Yes, and the fact also that we started working on these tax returns about Washington's Birthday.

The Court: You stopped working?

The Witness: We start working.

Q. In any event he would give it to you before he went away?

A. Yes.

Q. You would not telephone him in Phoenix or Florida or San Francisco to get that sort of a figure over the telephone?

A. No.

Q. I am not trying to say that it is a crime to get it over the phone—

A. It is quite an expensive matter, getting it over the telephone.

Q. And almost impossible from an accounting standpoint, is it not?

A. That's right.

Q. Mr. Sanfilippo, in connection with Rosina Palermo, I would like to direct your attention to some of your testimony [fol. 67] money given on the examination in chief, and I will refer to pages 280 and 281 of the record.

Q. Did you sometimes hear the Doctor say to his mother words to the effect that "I made money for you in the market today?"

A. Yes, with the exception that I don't remember the word "today."

Q. You put it in your way—

A. That's right.

Q. In substance what did you hear him say to his mother?

A. In substance he said, "I am making some money for you."

Q. In the market?

A. In the market, that's right.

Q. Before the tax investigation, am I correct, that the only thing you knew about whose income the transactions in Rosina's name were was that you had heard the defendant from time to time tell his mother that he was making money for her in the market, is that right?

A. Yes.

Q. And it was not until after Revenue Agent Mishler came into the picture that the defendant ever told you that he was merely telling his mother that to make her feel good, is that right?

A. Yes.

Q. Am I correct then that until Revenue Agent Mishler came into the case you personally had no knowledge or information whatever as to whose property or transactions these were except what you have described?

A. Yes, sir.

The Court: I will ask it again. You said that he said to her, that is, the defendant said to her in your presence in a joking way that he was making some money for her in the market?

The Witness: Yes, sir.

The Court: Do you know that he was joking before when he told you that or after Mr. Mishler came in that he told [fol. 68] her that only to make her feel good?

The Witness: After Mr. Mishler came into the picture was the first time I had definite knowledge from him that it actually was his account. He was just telling that to his mother to make her feel good. He had done that in the past—

The Court: All right.

The Witness: —with respect to other things.

Q. I think, Mr. Sanfilippo, I would like to pursue that a little further. After all, this was a very closely-knit family, was it not?

A. Yes.

Q. At one time you were about 12 or 14 members of the family, all living up there at 408 West 145th Street, is that right?

A. Yes.

Q. You used to meet up there every Tuesday night?

A. That's right.

Q. Rosina was your own mother-in-law?

A. Yes.

Q. Now the Court asked you whether you knew or were aware of the fact that the defendant was telling his mother, he was making money for her in the market just to make her feel good at any time before Mr. Mishler came into the case, and what was your answer to that?

A. My answer is that, no, that's the first time I had definite knowledge of it.

Q. Knowledge that they were his transactions?

A. That's right.

Q. And not hers?

A. That's right.

The Court: And that came after Mr. Mishler came into the case?

The Witness: Yes.

[fol. 69] Q. At pages 284 and 285, after questions about this Rosina matter, the following questions occurred. I will begin reading at the bottom of page 284.

Mr. Sanfilippo, what records were you referring to?

A. I don't know just the records that he had in mind when he told me that he would go over the situation with a view at finding out what errors occurred and to make any adjustments that would be necessary after he would find such errors.

Q. Who had his bank accounts and cancelled checks?

A. Well, in the beginning we didn't have those; later on during the examination we did have them at our office.

Q. Well, do you mean to say, for example, that for the year 1950 your firm did not have his bank accounts and cancelled checks at the time you were working on his return?

A. No, we did not.

Q. And, by the way, you had a staff here in New York?

A. Yes.

Q. There was Amoruso who was your partner, is that correct?

Q. Did your firm have the defendant's bank statements and cancelled checks during the years of or for the tax year 1952 at the time you were preparing his return?

A. Yes.

Q. In 1951 you went to Fresno during the tax season?

A. Yes, sir.

Q. Do you know approximately when you left New York?

A. Around the 31st, around the end of January.

Q. That would be around January 31, 1952?

A. '52, that's right.

[fol. 70] Q. When did you return in 1952, approximately?

A. Around the 20th of April, the same year.

Q. The 1949 return, which is Government's Exhibit 5, appears to bear the signature of Mr. Amoruso. Did that indicate that he was the one who supervised the preparation of that return?

A. Not necessarily.

Q. I will show it to you and perhaps you may be able to tell us or perhaps not. Could you tell us from the return whether he was the one who supervised it?

A. Not necessarily. He may have signed it because we usually take turns in signing these returns for the firm upon completion.

Q. Here is the 1948 return, Government's Exhibit 4, and that one you signed. Would you tell us whether that one was prepared under your supervision?

A. Yes.

Q. Did your firm have the bank statements and cancelled checks of the defendant for 1948?

A. Not that I remember.

Q. Now, your firm had the defendant's margin accounts, did they not, during the years?

A. Yes, for most of the years. I don't know whether we had them for every year or not.

Q. We are talking about this conversation between you and the defendant when you say that he said that there has been some errors made apparently and he would check his records, and I asked you what records. Who had the worksheets that had been used in preparing the returns?

A. We would have them.

Q. Who had the retained copies?

A. We did.

Q. Was it your practice to retain in your files the brokerage statements which he had sent to you?

A. I am not sure of the procedure with respect to that.

Q. Did you retain them or not?

A. We did retain some of them. For what period of time I cannot say.

Q. Well, did you say to the defendant when you say he said he would have to check his records, that you would do [fol. 71] the work?

A. No, I would just more or less submit the result and discuss the result upon completion of his detail work, whatever work he had to do.

Q. Now, this was in connection with the tax case?

A. That is right.

Q. Who was representing him in the tax case at that time?

A. I was.

Q. I read from page 286:

Q. Did your conversation with the defendant in which you told him that Rosina's transactions were part and parcel of his gross income occur prior to the preparation by your firm of his 1952 tax return?

A. It is difficult for me to say at this time because it happened so shortly, about the same time that the examination was taking place, I cannot fix the date.

Q. In connection with the preparation of his 1952 return, did you say anything to him about whether he should include Rosina's income in that return?

A. I don't remember. I couldn't answer that question.

Q. Mr. Sanfilippo, you knew he was in serious tax difficulties with the Government at the time, is that correct?

A. We knew there were some differences in the dividends reported. How serious it was, of course, we didn't know at the time.

Q. When did you make any effort to find out?

A. Subsequent to the time when we filed amended schedules covering the dividends.

Q. Are you referring to the time when you drew for the defendant to sign and he sent to Internal Revenue a statement of additional dividends, stockholdings and income? Is that what you are talking about?

A. Yes.

Q. Are you telling the jury that the first time you made any effort to find out how serious the tax investigation was, [fol. 72] was after you had sent that letter?

A. About the time that that schedule was prepared.

Q. When were you first retained by the defendant to represent him in the tax investigation?

A. Sometime in January of the same year.

Q. When did he first tell you about his meeting with Mr. Mishler?

A. About the same time.

Q. Are you saying to the jury that you represented him in the tax matter as his professional representative and that you did not make any effort to find out how serious it was until sometime in April, May or thereafter?

A. No.

Q. No, you didn't or no—

A. No, I didn't.

Q. You did not?

A. No.

Q. And you are unable to tell us now whether you had this conversation with him about Rosina before or after you prepared the 1952 return?

A. I cannot definitely say so. My vague recollection is that it was known at the time that we prepared the return. This was around February sometime, but I cannot definitely state.

Q. You were his accountant, were you not?

A. Yes.

Q. By this time you were his accountant who was representing him in an investigation by the Government?

A. Yes.

Q. You had been advised that there had been substantial understatements of income in prior years; correct?

A. Yes.

Q. The returns had been made and certified by your own firm; correct?

A. Yes.

Q. Prepared and certified?

A. Yes.

Q. Was it your understanding that the defendant looked to you for professional advice?

[fol. 73] Q. Is that correct?

A. I assume that. I assume that he relied on me to represent him, his interests.

Q. Did you have any doubt about it—withdrawn—do you have any doubt about it now?

A. No.

Q. Did you regard it as your duty to tell him what to do?

A. Yes.

Q. Mr. Sanfilippo, I show you a photostat, being a portion of Government's Exhibit 629, of a slip of paper which was referred to in your direct testimony, and I believe you identified it as being in your handwriting. Do you see that?

A. All of it except the 1050.

Q. That is right.

A. Yes.

Q. Now I show you what has been marked Defendant's Exhibit X for identification and ask you if it is the original of the slip which is annexed to Government's Exhibit 629?

A. Yes.

(Defendant's Exhibit X for identification received in evidence.)

Q. Now I believe you testified that what is now Defendant's Exhibit X is all in your handwriting except for that figure 1050, is that right?

A. Yes.

Q. Now, was Defendant's Exhibit X a memorandum made by you of information supplied to you by Dr. Palermo?

A. Yes.

Q.

First I show you Defendant's Exhibit O-7 for identification and ask you to inspect it briefly and tell us whether it is a folder containing worksheets of your firm for Dr. Palermo, for work done for Dr. Palermo for the year 1948?

A. Yes.

[fol. 74] Q. Now, look at a memorandum slip contained in that folder to which I am pointing, and I will ask you if it is in your handwriting?

A. Yes.

Q. And would you inspect it, please, and tell the jury whether that is a memorandum or a note made by you in 1948, similar to the 1949 slip of the information supplied to you by the Doctor.

A. Yes.

Mr. Newcomb: May we have that marked in evidence as Defendant's Exhibit O-7-A,

(Defendant's Exhibit O-7-A received in evidence.)

Q. This is information given to you by the Doctor?

A. Yes.

Q. So that the Doctor in 1948 or with respect to 1948, when he gave you this information, did not give you any information as to interest paid to brokers, is that correct?

A. It appears so, yes.

Q. Then it says "Dividends received approximately 5,000." Do you see that?

A. Yes.

Q. That is what he told you?

A. Yes.

Q. Then it says, "\$7,000 dividends in brokers' statements." Do you see that?

A. Yes.

Q. So that when you talked to the defendant with respect to his 1948 return he told you, did he not, that according to the way he figured it, he had at least \$12,000 of dividend income; is that not true?

A. It may be true at this stage of the game.

[fol. 75] Q. Did he tell you that?

A. This appears to be preliminary slip and not the final form.

Q. And so was the one for 1949, wasn't it?

A. I don't know.

Q. Well, let's look at it. You look at the one for 1949 and you tell me whether you can say that the one for 1948 was preliminary and the one for 1949 was not?

A. They were both preliminary to the extent that we get this information over the phone and we jot it down quickly, and whatever amount or information must be submitted on this 1948 slip would have been submitted at a later date. Whatever was marked "Approximately" would be amended or adjusted or we would get the final and complete figures at a later date.

Q. The return for 1949 was signed by Mr. Amoruso that I show you this morning and it used the figure "\$5131" on this memorandum; but am I not correct that at the time you made that memorandum it was a mere preliminary survey and talk with the Doctor exactly the same as in 1948?

A. Yes.

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Q. Defendant's Exhibit X is a slip relating to the tax year 1949. Do you see that?

Q. Yes.

Q. Defendant's Exhibit O-7 is the slip relating to the tax year 1948, is that correct?

A. Yes.

Q. Both, you say, reflect preliminary conversations that you had with the Doctor about the matters set forth therein, is that correct?

A. Yes.

Q. And both, you say, record the information given to you by the Doctor?

A. Yes.

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Trial Resumed.

ARTHUR R. SANFILIPPO resumed.

Mr. Newcomb: Your Honor, I will resume reading certain questions from the testimony and I will resume with page 316 of the record.

Mr. Sanfilippo, was this information relating to capital gains given to you orally or in writing?

A. Orally.

Q. Was it given to you personally each year by the defendant?

A. No.

Q. Was it given to you personally in any year by the defendant?

A. Yes.

Q. Working backwards, was it given to you personally in 1952—for the tax year 1952?

A. I don't remember that.

Q. Was it given to you personally for the tax year 1951?

A. I don't remember.

Q. Was it given to you personally for the tax year 1950?

A. I don't remember.

Q. Was it given to you personally for any of the tax years 1945 to 1949 inclusive?

A. It was given to me during some of those years. As to each particular year I cannot remember.

Q. Did he give you individual sales?

A. Yes.

Q. And then individual sales figures as to how much he had sold the stock for?

A. Yes, except that he would submit at times brokers' statements showing the amount or the date.

Q. Well, when he submitted brokerage statements, of course that would be in writing?

A. Yes.

Q. When it was given to you orally, am I correct that your statement to the jury is that he gave you his sales, [fol. 77] the dates thereof, the sales amounts, the dates of purchase, and the cost of acquisition separately as to each transaction?

A. Yes, only that it would be so in part at times—

Q. I said when he gave it to you orally, is that your testimony?

A. Yes, except that the entire transaction may not have been given to me orally.

Q. But to the extent that he gave it to you orally, is that your testimony?

A. Yes.

Q. When it was given to you personally did you make a memorandum of it or did you try to carry it in your head?

* * * * *

A. At any time that it was given to me I would make a note on paper.

* * * * *

Q. Now let us see if we can describe those memoranda: Do you recall any one of them that had as many as 20 stocks on it? It is a fairly long memorandum.

A. Yes.

Q. Do you know for what year?

A. I believe I saw several years.

Q. Are you limiting your answer or answers Mr. Sanfilippo, to capital gains transactions that were given to you orally?

A. I could not tell from the working papers whether that information was received orally or whether it was copied from brokers' statements that were submitted to us or to me:

Q. Well, do you actually have any recollection, Mr. Sanfilippo, of writing down the details of capital gains transactions, sale, date, amount, shares, corporation, purchase date, cost, and the like and that sort of thing being given to you orally over the telephone by the defendant?

A. No, I don't.

Q. I want to go back, then, to your testimony at page 316 and ask you whether you want to correct it. At page 316, Mr. McHugh asked you how you ascertained the figure for the defendant's capital gains; do you remember?

A. Yes.

[fol. 78] Q. And I read it to you this morning, and you said that he would submit it to you, the sales price or the amount, the date of sale, the cost, the date of purchase; and Mr. McHugh said then:

"Q. Of each and every sale?"

And you said, "Yes."

And then you said, "The same practice was followed in '49, '50, '51 and '52."

Now, am I not correct that what the defendant did was, he gave you his brokerage accounts; correct?

A. Supporting oral information that he gave us prior to that to some extent.

Q. He did not, did he, give you any list of his sales as distinguished from merely the brokerage accounts which he turned over?

A. I don't remember the exact details. I can only give you information as to the general procedure that took place.

Q. Is it not your testimony to the jury now, then, that you do not remember the details of what the defendant gave you with respect to capital gains except the brokerage accounts which he delivered to you; is that correct?

A. I can remember only verbal information but I cannot identify it, and we may have no supporting written information.

Q. Did this sometimes happen, that on his brokerage accounts you would find a sale and you would not have information as to when the stock was acquired?

A. Yes.

Q. And then sometimes you would call the defendant and ask him what he knew about it?

A. Yes.

Q. And sometimes he would tell you, would he not, that he thought he bought it in a certain year at a certain rough price?

A. Yes.

Q. A certain estimated price, is that correct?

A. Yes.

Q. And is that, in fact, the only type of information you ever got from the defendant orally as to capital gains?

A. Yes.

[fol. 79] The Court: How did you determine what sales the defendant had made during a particular year?

The Witness: That would be given to me verbally, orally.

Q. Mr. Sanfilippo, let us go back again:

Please tell the jury whether it is your statement to them that the defendant gave you orally information as to his sales of stock, orally?

A. Yes, he did give me information orally.

Q. You cannot identify for what year?

A. No.

Q. How about 1952?

A. I cannot identify it.

Q. And 1951 was Mr. Amoruso. How about 1950?

A. I could not identify that either.

Q. So you cannot tell us what information he gave you orally, is that correct?

A. That is right.

The Court: Well, I wanted to know about the practice. There must have been some way that you determined what sales were made for the purpose of making out the capital gains part of the return.

Now, how did you find out what the sales were before you got the additional information as to whether there was a gain or loss; whether it was a long-term or a short-term capital gain?

The Witness: He would tell me verbally what sales he had made generally, and then at times he would support that with complete cost figures and dates, and at other times he would submit to me brokers' statements or confirmation vouchers from the broker.

The Court: Then you did not assume that the sales shown on the brokerage statements which were in your possession were the only sales that the defendant had made?

The Witness: No.

Q. It was your understanding from year to year that he had sales which were not reflected on the brokerage accounts which he gave you, is that your testimony?

A. I had no fixed knowledge one way or the other. I took the information that he gave me as to sales as being all the sales that he would have in that particular year.

Q. Did it sometimes happen that you fellows in the accounting office and your firm would have information as to sales and would nevertheless omit them entirely from the tax return? Did that happen?

A. I don't remember such instances. It could happen as an error, as an omission.

Q. You say it could happen?

A. It could happen, but I don't remember such a thing happening.

Q. Well, if it did happen and you knew it, then, of course, your certification was fraudulent, wasn't it?

A. That is right.

Q. Well, was your certification fraudulent?

A. No.

Q. You say you got information orally from the defendant. Who else was present on any occasion that you can recall when the defendant was giving you information as to his capital gains?

A. I don't remember that. The only possibility that I could mention is that at the time he was down at my office there may have been others around; but usually it would be at his private office.

Q. By the way, did he make a practice of going to your office?

A. No.

Q. As matter of fact, how many times would you say he was there in a period of five years?

A. Once, possibly twice.

Q. Did you make a memorandum in every instance when he gave you this capital gains information orally?

A. Yes.

Q. But you have never seen those memoranda in the past five years, have you?

A. I saw it in the memorandum that you showed me the [fol. 81] other day with respect to one of the years.

Mr. Newcomb: May I have the exhibit?

Q. Are you referring to either one or the other of Defendant's Exhibit X and O-7A?

A. I am referring to Exhibit X wherein that states, "No stock sales."

Q. All right. And Exhibit O-7A also says "No stock sales"?

A. Yes.

Q. Now then, these are instances where he had none, but my questioning was directed towards instances where he did have sales.

Now, did you make a memorandum of any information given by him in instances where he had sales?

A. Yes. I would make my memorandum either on a piece of paper or directly right on the office draft of the return.

Q. And have you seen any of those memoranda in the last five years?

A. No.

The Court: That is, you can't identify any one of the office drafts as one where you made the memoranda directly upon receipt of the information orally from the defendant?

The Witness: Yes, your Honor.

The Court: You can identify some—

The Witness: No, I cannot, no.

By Mr. Newcomb:

Q. * * * Did the defendant sign his tax return in blank and leave it with you before he went south on the spring training trip with respect to the tax year 1952?

A. I cannot identify any one of those three years. I don't know in what year it could have happened.

Q. How about 1951 when you left at the end of January and went away, did he do it that year?

A. I don't know.

[fol. 82] Q. Did he do it in 1950?

A. I don't remember that either.

Q. You can't tell us which one of the three years it was?

A. That is right.

Q. Are you positive that it was only one of those three years?

A. To the best of my recollection.

Q. Do you not know as you sit there that it was in every one of those three years?

A. No.

Q. So there may be no future misunderstanding about it, is it your sworn statement under oath that that only occurred in one of the three years?

A. That is my best recollection.

Q. Mr. Sanfilippo, do you hold what is known as a Treasury card?

A. Yes.

Q. Are you required to be certified by the Treasury before you can represent taxpayers in tax cases?

A. Yes.

Q. You must have a Treasury card?

A. Yes.

Q. So-called?

A. Yes.

Q. Correct?

A. Yes.

Q. You must apply somewhat in the same fashion as a lawyer must to be admitted to the Bar; you must apply to be permitted to practice before the Treasury, as we call it, is that right?

A. Yes.

Q. And after your application has been received and processed and reviewed, then you are issued what is called a Treasury card?

A. Yes.

Q. And that Treasury card is extremely important to an accountant, is it not?

A. That is right.

Q. Without it he cannot represent clients in tax cases; correct?

A. That is right.

Q. If you admitted that you had certified returns or a return known to you to have been signed in blank by the

taxpayer and filled out by your firm thereafter and certified by you and filed directly by you without it being shown [fol. 83] to the taxpayer, would you not lose your Treasury card?

A. I don't know.

Q. You are concerned about that, I take it?

A. I am.

Q. Could you tell us where Exhibit 6 was signed by you for the first time?

A. Sometime during the month of January or February of 1953.

Q. Where?

A. I cannot recall where. Either at my office or at Dr. Palermo's office.

Q. Did you examine it? Did you look at it when it was given to you?

A. Yes.

Q. Who gave it to you, the Doctor?

A. Yes.

Q. What did you say to the Doctor about it?

A. I don't recall the conversation.

Q. Was anyone else present when he gave it to you?

A. No.

Q. Do you remember whether it was given to you by him in person or was merely sent down to your office by Mr. James Pollaci or one of your girls? Do you have any recollection on that score?

A. I don't have any recollection.

Q. Sir?

A. I don't have any recollection of receiving that from anyone else.

Q. Do you have a clear recollection of receiving it at this time at all?

A. Yes.

Q. As I understand it, then, you say that you don't know where you received it. Now, could you tell us when?

A. I cannot identify the period any closer than I did. It was sometime in January or February of 1953.

Q. And you cannot recall anything that you said to the Doctor about it at that time?

A. Not specifically. I can give you more or less my best recollection of the purpose for demanding this detailed information.

Q. You said "demanding." Are you telling the jury you demanded it?

A. No. I am referring to your inquiry here when I said "demanded." In other words, where you are asking me [fol. 84] questions concerning this form, all I can say is that it was given to us for a certain purpose, and namely the purpose was to get corrected figures concerning his dividends as requested by the revenue agent, Mr. Mishler.

Q. By Mr. Mishler?

A. That is right.

Q. That is, Mr. Mishler asked you for additional information, and you asked the Doctor and he produced this?

A. That is right.

Q. Is that right?

A. That is right.

Q. When you asked for this did you tell the Doctor what Mr. Mishler had told you?

A. Yes.

Q. What did you tell the Doctor that Mr. Mishler had told you?

A. I told him that he had found some discrepancies in the amount of the dividends reported as compared to data that he had at that time of the examination.

Q. Now, there is a "him" and a "he" in there referring to two different people, and it may be confusing in the record. Is what you intended to say as follows, that you told the Doctor that Mr. Mishler had told you that there were certain discrepancies of unreported dividends; is that right?

A. That is right.

Q. Do you remember telling the Doctor how much Mr. Mishler had indicated to you there was in the way of unreported dividends already discovered?

A. In the early stages I don't believe there was any amount mentioned. The question arose that there were discrepancies—that is, the agent wanted more accurate figures to determine the amount of such understatement.

Q. What did you tell the agent?

A. I told him I would try my best to get the information for him.

Q. And when you talked to the agent was he at your office or was it on the telephone, or what?

A. He was at my office.

Q. And that was the occasion of the agent's first visit to your office, I take it, is that right?

A. I believe it was the first visit. I am not sure of that.

[fol. 85] Q. When you had this conversation with the Doctor for additional information, did you at that time indicate to him that the tax investigation was very serious?

A. I don't remember stressing the point except for stating that there was an evident discrepancy.

Q. Sir, you hold a Treasury card and you are a certified public accountant. There are different degrees and varieties of tax investigations, are there not?

A. Yes.

Q. And then of course there is a criminal investigation, such as this case became, and the latter, of course, is very serious. Did you tell Dr. Palermo after you had talked to Mr. Mishler that this might turn into a criminal case?

A. I don't remember telling him that in the early stages during the examination by Mr. Mishler.

Q. Well, at the time he delivered, you say, Exhibit 6 to you, the one you have in front of you, the Steiner-Rouse card, had you told him then that this could be a very serious case and a very dangerous one, in words or substance?

A. I couldn't say yes to that question either.

Q. After you received Exhibit 6 what did you do with it?

Q. What did you personally do with it?

A. I took a summary or a tape of the dividends both for 1951—

Mr. Newcomb: Pardon me. May I interrupt, your Honor?

Q. You received it from the Doctor; then did you take it to your form or to your office?

A. I don't remember the details surrounding the carrying

around or the transfer or the removal of this paper from one place to another.

Q. Well, may we safely assume, therefore, that you had it in your office from the time the Doctor gave it to you, or from then on? That is all I am getting at.

A. Yes.

Q. And when you reviewed the Doctor's file?

A. Yes.

[fol. 86] Q. Indeed, it was used, was it not, in the preparation of the Doctor's 1952 return?

A. Yes.

Q. You say you ran adding machine tapes on it on some occasion; is that right?

A. That's right.

Q. Am I correct that the adding machine tapes that you ran on it were run some period after or quite long after you had first received it?

A. I don't remember how soon it happened after I did receive it. My recollection is that it was a short period thereafter, very short.

Q. When you ran the tapes on it, as you say, did you talk to the Doctor about it specifically?

A. Some time thereafter I did, yes.

Q. What did you tell the Doctor about Exhibit 6?

A. I told him that it differed with respect to the amount of dividends reported for the year 1951.

Q. What else did you tell him about it?

A. I also had told him that the agent had requested also similar information covering the other year or years that were involved in the examination.

Q. Let me get the sequence straight. As far as you are concerned, the agent asked you for information, additional information, is that right?

A. Yes.

Q. And in the sequence of events, the next thing was that you asked the Doctor?

A. Yes.

Q. Is that right?

A. Yes.

Q. The next thing was the Doctor gave you Exhibit 6, is that right?

A. Yes.

Q. Thereafter you asked the Doctor for additional information relating to 1950 and 1949, is that right?

A. Yes.

Q. After you received Exhibit 6, did you take it up promptly with your partner, Mr. Amoruso?

A. Yes, I discussed it with my partner, Mr. Amoruso.

Q. Exhibit 6?

A. Yes.

[fol. 87] Q. Shortly after the Doctor gave it to you?

A. I don't remember exactly at what time I discussed it but it was some time close to the time that it was submitted to us.

Q. Now, we are referring to a conversation between you and Mr. Amoruso about Exhibit 6 shortly after you first received it from the defendant. Please relate the conversation.

A. I don't remember just what was discussed or the exact conversation.

Q. Did you discuss it with Mr. Barranco?

A. No.

Q. Did you have a meeting about it?

A. No.

Q. Mr. Sanfilippo, I direct your attention to certain questions and answers beginning at page 356 of the record, about the middle of the page.

That is the end of the reading from the record. Did your firm keep an appointment book as one of its regular records?

A. Yes.

Q. I show you Defendant's Exhibit X-7 for identification and ask you if that is your firm's appointment book for the year 1953?

A. Yes.

Q. Would you look under date of February 14th in Defendant's Exhibit X-7 for identification and see if you find a notation therein indicating an appointment with Dr. Palermo?

A. Yes.

Mr. Newcomb: I offer the page for February 14th in evidence as Defendant's Exhibit X-7-A.

(Defendant's Exhibit X-7-A for identification received in evidence.)

[fol. 88] Mr. Newcomb: Ladies and gentlemen, this appointment book which is Defendant's Exhibit X-7-A in evidence has in it towards the bottom of the page for February 18, an entry, "ARS appointment Dr. Palermo 4.00 p. m."

Q. Do you see that?

A. Yes.

Q. Was that the occasion, Mr. Sanfilippo, when you say you sat down with the defendant and went over the figures of the 1952 return with him?

A. Yes.

Q. Mr. Sanfilippo, I show you Defendant's Exhibit N-5 for identification and ask you whether you recognize it as the original pencil copy of the defendant's 1952 return?

A. I do.

Q. Is that the pencil copy that was made up in your office?

A. Yes.

Mr. Newcomb: We have marked these separately so that we can get them identified. May I correct my offer to say simply the first page. We will make the others available. We are going to offer it all.

(Received and marked Defendant's Exhibit N-5.)

Q. Mr. Sanfilippo, I now hold in my hand Defendant's Exhibit N-5, being pages 1 and 2 of the retained copy which

you have identified, and which is in evidence. Did you go over that with the Doctor on February 14, 1952?

A. I went over that draft or a piece of paper showing the equivalent information with him at that time.

Q. Let us see if we can't find some markings on this one which may help us: On the upper righthand corner [fol. 89] of this do you see the notation "TC" and "SH—3/16/53"? Do you see that?

Q. Now, "TC SH 3/16/53" means what?

A. "TC" represents the initials of the person that checked the computations of the return.

Q. Excuse me. I suggest you are in error. Let me ask you this: "TC" as it was used in your office means typing checked, does it not?

A. Type checked, excuse me, yes.

Q. And "SH" was who?

A. Was the initials of the person who type-checked it.

Q. And what person was that?

A. (No answer.)

Q. Well, Sally Hughes?

A. Sally Hughes it would be.

Q. Is that correct?

A. Yes.

Q. Now, that means that Sally Hughes checked the typing on 3/16/53, is that right?

A. That is right.

Q. What was the practice in your office, Mr. Sanfilippo, with respect to checking the typing of final returns?

A. The draft would be checked against the typed copy for any omissions or errors in the typing.

Q. So that that was done, according to this notation on your record on the 16th of March by Sally Hughes?

A. Yes.

Q. Now look at the original of the return, Government's Exhibit 3. You signed the return when?

A. I may have signed it at any time prior to March 16, 1953.

Q. Looking at the Defendant's Exhibit N-5, indicating that it was not typed until that day, when did you sign it?

A. My recollection is that these dates signify the date that the typechecking was done, not that the report or the return was typed actually on that day. It may have been typed a day or a week or even a month earlier than that day. The typechecking alone was done on March 16, 1953.

[fol. 90] Q. Now, the return on its face shows that it was filed that day.

A. Yes.

Q. Is that correct?

A. Yes.

Q. By the way, Miss Hughes, you realize, is dead?

A. So I heard.

Q. Now, your statement then is that this 1952 return was made up, typed and checked by February 14th?

A. No. I can only say that it was done sometime prior to March 16, sometime between February 14th and March 16, 1953.

Q. Now, do these refresh your recollection that the defendant signed this return in blank?

A. Not particularly.

Q. Particularly or otherwise, does it refresh your recollection in any respect?

A. No.

Q. Was it your firm's practice to type up the Doctor's return in final form a month before it was filed?

A. It was not the practice but it did happen.

Q. Was it your firm's practice to your knowledge to prepare the Doctor's returns at the last minute, within a week or two prior to the 15th of March?

A. No, except that it would be sent out at the last minute along with several of the others that it did not require the presence of the taxpayer at any later date.

Q. Now I show you Government's Exhibit 1 in evidence, the original 1950 return. Did you go over that one with the Doctor?

A. I went over the draft either on paper or the rough draft with the Doctor, yes.

Q. Now I show you what has been marked Exhibit YY for identification and ask you if it is the original retained copy of the Doctor's return for 1950?

A. Yes.

Mr. Newcomb: Again the exhibit consists of pages 1 and 2, and I offer it in evidence.

Mr. McHugh: No objection, your Honor.

(Defendant's Exhibit YY for identification received in evidence.)

[fol. 91] Q. Mr. Sanfilippo, I hold in my hand Exhibit 1, which is the original return for 1950, and ask you if that is what you had when you went over the figures with the Doctor?

A. I don't remember.

Q. I now hold in my hand Defendant's Exhibit YY in evidence, which I showed you a moment ago, which is the retained pencilled copy for 1950, and ask you if you had that when you went over the 1950 figures with the Doctor?

A. I either had that or I had a draft of the digits on plain paper.

Q. Now, looking at the return for 1952, Government's Exhibit 3, as I understand the tenor of your testimony, it is this: You went over all the figures with the Doctor, is that right?

A. Yes.

Q. At the time you did it you had before you either the original return as finally typed, signed and filed, Government's Exhibit 3, or the final retained copy of which pages 1 and 2 are Defendant's Exhibit N-5, or a piece of paper containing the same figures, is that right?

A. Yes.

Q. And in 1950, when you went over the figures with the Doctor, you went over all of the figures in his return, is that right?

A. Yes.

Q. And when you did that you had before you or with you either Government's Exhibit 1, which is the original return as finally typed, executed and filed, or Defendant's

Exhibit YY, which is the original pencilled copy, or a piece of paper containing the same figures, is that right?

A. Yes.

Q. Looking at the 1952 return, then, is it your testimony that you had before you and went over with the Doctor either the return, the retained copy or a piece of paper on which it appeared that the tax to be paid by him that year was \$5,625.09?

A. Yes.

Q. In 1950 did you have before you when you were going over the figures with the Doctor either the return, the pencilled copy, or a piece of paper on which it appeared [fol. 92] that the tax to be paid by the Doctor was \$5,507.48?

A. Yes.

Q. Mr. Sanfilippo, please look at Defendant's Exhibit YY, being the retained pencilled copy for 1950, and tell me whether it is not a fact that the tax amount to be paid was not even calculated until March 14th?

A. I can't tell that from looking at the return.

Q. Do you have an employee or did you have an employee named Carrie Artino?

A. Yes.

Q. Do you observe that portions of Miss Artino's handwriting are on Exhibit YY?

A. Yes.

Q. Do you observe in her handwriting the date in the lower righthand side "3/13/47"?

Mr. McHugh: 1951, sir.

Mr. Newcomb: I am sorry.

Q. "3/13/51"?

A. Yes.

Q. I show you a declaration of estimated tax for the year 1951 and ask you if you recognize it as one of the estimates which your firm filed on behalf of the defendant?

A. Yes.

Q. Now, when you filed a return for one year, or, at least, in those days it was the procedure when you filed a return for one year you would file with it an estimate or a declaration of estimated tax for the ensuing year?

A. Yes.

Mr. Newcomb: I will now offer in evidence the declaration of estimated tax marked Defendant's Exhibit CCC for identification.

Mr. McHugh: No objection, your Honor.

(Defendant's Exhibit CCC for identification received in evidence.)

Q. Mr. Sanfilippo, do you observe on Defendant's Exhibit CCC item 1 of the printed form reads: "Your 1950 income tax"—do you see that?

A. Yes.

[fol. 93] Q. And do you see the amount set forth therein, \$6,417.48?

A. Yes.

Q. And the tax actually set forth in the return for that year is \$5,507.48; do you see that?

A. Yes.

Q. Now, the "6,417.48" is in Miss Artino's handwriting; do you see that?

A. It appears to be.

Q. Now look at Defendant's Exhibit YY and tell me whether you recognize certain changes in the figures with the result that some of the figures on it are in Miss Artino's handwriting and some are in your own? Would you see if you find instances of that? Look at the first page only.

A. I don't recognize any of my handwriting on there.

Q. By looking at these two, does it not refresh your recollection that what happened was that Miss Artino gave you Exhibit YY showing the tax of \$6417.48 and you reviewed the return and made certain corrections and changes, and revised the tax downward to \$5507.48? Isn't that what happened?

A. It is possible that that happened. That is the purpose for type checking and comp checking, was to find errors and correct them.

Q. And actually Miss Artino wrote up the pencil copy, completed it on March 14, 1951, and your revision took place on and after March 14th when the defendant was either in Florida or Arizona?

Mr. McHugh: I am going to object to that.

Mr. Newcomb: Well, perhaps the objection is sound.

The Court: Leave out the defendant.

(Question read.)

A. I don't remember whether that was—whether that took place on March 14th or at an earlier date.

Q. So that we will get that straight, you now say that you don't remember when it was that you went over these figures with the defendant; is that what you say?

A. No.

[fol. 94] A. My statement was before in each case I would say that these returns were gone over with him on or before the date specified on the return. In this case it would have been on or before March 13th, or as it states on the estimated return, on or before March 14th.

Q. Now you have told us unequivocally that you went over these returns with him item by item, is that right?

A. Yes.

Q. And that the figures were not changed thereafter, is that correct?

A. I cannot say as to that.

Q. Well—

A. In this particular case.

Q. What we are trying to find out, Mr. Sanfilippo, is whether you went over with the defendant item by item the figures which finally appeared in the tax return. You understand that, do you not?

A. Yes.

Q. That is what we are trying to find out. Now is it your statement to the jury that you did do that?

A. We did do that with respect to drafts, office drafts.

Q. Were the figures that you went over with the Doctor the same identical figures that went into the final return?

A. Where there were discrepancies between the draft and the final return, I cannot state what took place, I do not remember.

Q. You have been very clear up to now and very unequivocal that every final figure in the return you went

over with the Doctor. Now, do you now state that that testimony of yours has been incorrect?

A. I do not state that.

Q. When you went over the figures with the Doctor did you have in your hands or with you a return, a draft of a return or a piece of paper showing the tax to be \$5507.48?

A. I don't remember just that particular amount on it.

Q. When you went over the 1950 figures with the Doctor did you have in your hands or with you a final return or a pencil copy or a piece of paper in which you showed that his total receipts from business or profession were \$10,706.00?

A. Yes.

[fol. 95] Q. And did you have with you a final return, a draft or a piece of paper on which it appeared that his expenses to be deducted from his medical gross were \$4892.08?

A. Yes.

Q. When you went over the figures with the Doctor for 1950 did you have in your possession at that time a return, a pencil copy or a draft or other memorandum showing that with respect to capital gains he had sold stocks during the year for a total sales price of exactly \$30,335.15?

A. Yes.

Q. Did you have before you, when you went over the figures with the Doctor, a final return, a pencil copy or a sheet of paper on which it appeared that the cost of securities sold by him during the year was exactly \$29,703.64?

A. Yes.

Q. Is it not a fact that those figures were not even in existence?

A. No, I cannot say that.

Q. Is it possible that they may not have been existence?

A. It is possible but there may have been some error between the time that the draft was made and the final return was made out, in which case we would notify the Doctor on the next meeting that such a change was made.

Q. Would you call him up on the long distance telephone?

A. No.

Q. You would tell him about that after he got back?

A. To the best of my recollection I would, unless I saw him before that.

Q. Do you actually remember any specific occasion on which you said to him, "Doc, or Dr. Palermo, we found an error and we have changed the figures between the time I went over them with you and the time we filed it?"

A. Yes.

[fol. 96] Q. When you went over the figures with him for the 1950 return is it your testimony that you had before you either the final return, a pencil copy or a sheet of paper on which it appeared that the short term capital gain realized by the defendant during the tax year 1950 was precisely \$631.51?

A. Yes, subject to the qualification made before.

Q. Are you saying that, sir, because it is true or because you are afraid if you admit otherwise you will lose your Treasury card?

A. No, I am saying that because from what you have shown me it appears that there may have been an error in between the time that the draft was made and the final return prepared.

Q. Mr. Sanfilippo, once and for all, did you go over the figures in the 1952 return with the Doctor and in the 1950 return with the Doctor approximately a month before the returns were filed?

A. I don't remember the exact date.

Q. Did you do so before the Doctor went south on the spring training trip in each of those years?

A. No.

Q. Actually you never went over the figures with the Doctor at all, isn't that right?

A. It is not.

Q. Well now, do you say you did or you didn't?

A. We did go over the figures with the Doctor.

Q. Each year?

A. Each year.

Q. Pardon me, there was a "we" in that answer. Did you personally go over the figures with the Doctor in 1952?

A. Yes.

Q. And were they changed thereafter, any of them?

A. Not that I know of.

Q. And did you do the same in 1950?

A. Yes.

Q. And were any of those figures changed thereafter?

A. I don't know.

The Court: Did you say that you didn't go over the figures of those two years before the Doctor went on his spring training trip?

[fol. 97] The Witness: No, what I said was that I went over the figures with the Doctor before he went on the spring training trip or at some other time prior to the filing of the report.

The Court: He might have come back?

The Witness: That's right.

Q. You mean that the Doctor might have come back from spring training and gone over these returns with you?

A. There may have been cases, I don't remember.

Q. Did it happen?

A. I don't know, I don't remember that.

Q. Can you give us any instance when that happened?

A. Not that I remember.

Q. And I take it you never sent these returns down to him in Florida or Arizona?

A. Not that I recall.

.

Q. In the years involved in the indictment, 1950, 1951 and 1952, you never mailed the returns to him in any one of those years, is that right?

A. Not that I recall.

Q. And 1948 and '49 the same?

A. The same.

Q. And is it your testimony that you didn't mail them to him at any time, let us say, after he became team physician for the Giants, is that right?

A. Yes.

.

Q. I believe you said when you were discussing the figures with the defendant you had either the return in final form or the pencilled retained copy, or a sheet of paper with the same figures on it; is that correct?

A. Yes.

Q. In those instances where you used a sheet of paper, who prepared it?

A. I would prepare it, or someone in my organization.

Q. Well, did you prepare it or did you not?

A. I did prepare some. Which ones they are I don't remember.

Q. Can you give us the name of anyone in your organization other than your partner, Mr. Amoruso, whom you [fol. 98] instructed to prepare a separate piece of paper containing all of the figures that ultimately went into the return? Can you give us anyone other than Mr. Amoruso that you directed to do that?

A. No, he would be the only one in the firm.

.

Q. Your answer seems a little puzzling. Would you tell us a little bit more about that?

A. What I meant to bring out is that to a partial degree similarly the other members of the staff would have done some work on each one of those years, but that either I or Mr. Amoruso would more or less summarize or correlate all of these figures to make up the final draft or return. Therefore it would boil down to Mr. Amoruso or myself making up the final draft that I referred to.

.

Did your firm have Dr. Palermo's bank statements and cancelled checks for the tax year 1950 at the time you were preparing his tax return for the tax year 1950?

A. I don't remember exactly what part of the bank statements we did have, but at times, and I believe 1950 was one of the years, we did have some of the bank statements in order to arrive at some interest charges covering the loans, secured loans.

Q. Did you have his bank statements and cancelled checks in full for any of the years 1950, 1951 or 1952 at the time you were preparing his original tax return?

A. None except for the year 1952, with respect to a full and complete list of statements and cancelled checks. 1952 was the first year, I believe, that we had the full set of bank statements and cancelled checks which were made available for the tax examination.

Q. Did you not have, Mr. Sanfilippo, all of the bank statements and all of the cancelled checks for each of the [fol. 99] tax years 1950, 1951 and 1952 at the time your firm was preparing the original returns?

A. No.

Q. Is there any doubt in your mind about that.

A. No, except possibly for the year 1952.

Q. Do you recall that there came a time when you were required to testify under oath by the special agent investigating Dr. Palermo's taxes?

A. I do.

Q. You testified under oath, is that correct?

A. Yes.

Q. And after you testified did you read your testimony and sign it, and I show you Defendant's Exhibit Y-7 for identification. Was this ever shown to you?

A. Yes.

Q. And you signed it, did you?

A. Yes.

Q. And you examined it before you signed it?

A. Yes.

Q. And you signed it August 23, 1956?

A. I don't remember the date but that is approximately correct.

Q. And you were sworn before you testified?

A. Yes.

Q. And then after you had examined it you swore to it again, didn't you?

A. I believe I did.

Q. Do you remember that you were asked by the special agent in this examination whether you felt that your firm had been negligent?

A. Yes.

Q. To which you answered under oath, "I do not think so"?

A. That's right.

Q. Then it goes on:

"Q. Then you knew that the Internal Revenue Service was conducting an examination prior to the filing of the 1952 return—is that so?"

To which you answered, "There was an examination pending."

Then you were asked:

"Q. Was any extra care utilized in preparing the 1952 return more so than was used in the prior years? Were [fol. 100] any additional records submitted to you to prepare that return than was submitted to you in prior years?"

To which you answered: "I do not remember, but I believe that if we had had some statements available at that time we would have been in a position to make a more complete return."

"Q. Were you depending on what records were submitted by the taxpayer rather than any independent examinations in prior years?"

To which you answered, "It did not vary in that respect in 1952. The information was still as submitted."

Now it is the last answer in which I am interested. Is it your statement to the jury now that in preparing and certifying the 1952 return, you were still acting on the basis of the information submitted by the Doctor, is that right?

A. Yes.

Q. Is it your statement to the jury that so far as you know your firm accurately incorporated into the return the information submitted to it by the Doctor?

A. To the best of our knowledge and belief, yes.

Q. Did you omit from the 1952 return any information,

data or transaction with respect to which the Doctor had supplied you with information relating to it?

A. The answer is No.

Q. And is the same true to the best of your knowledge, information and belief as to prior years?

A. That is right.

Q. Now I ask you to look at the folder which has been marked Defendant's Exhibit T-7 for identification and examine it briefly and tell us whether it contains your work papers, your firm's work papers for the tax year 1950, [fol. 101] covering work done by your firm in connection with the preparation of the defendant's tax return for that year?

A. Yes.

(Defendant's Exhibit T-7 for identification received in evidence.)

By Mr. Newcomb:

Q. Mr. Sanfilippo, I show you Defendant's Exhibit BB for identification which appears to be the original margin account of the defendant, or the original statements for his margin account for the year, 1950, his margin account with Fox, O'Hara.

Is it your recollection that for the year 1950 you had the defendant's margin account?

A. I don't remember.

Q. If it should appear that the 12 interest charges appearing on the Fox, O'Hara margin account statements for each of the 12 months of the year are precisely the same to the penny as appear on that work sheet, would it be perfectly clear to you that your firm had the margin accounts for each of the 12 months?

A. As I stated before on that same point, I definitely cannot say conclusively because of the fact that we have interest items here for 12 months that we also had 12 months statements.

Q. You say so tentatively?

A. That's right.

Q. Am I not correct that the dividends of \$2050 appearing on the first page of the Fox, O'Hara margin account was omitted from the Doctor's return?

A. Evidently, yes.

[fol. 102] Q. And if your firm prior to the filing of that return had the Fox, O'Hara accounts, then the omissions of \$2050 was due solely to the clerical or accounting errors of your firm, was it not?

A. Yes.

Q. Now let us see whether your firm did have the Fox, O'Hara account, and, particularly, since this item appears in January, the page for January 1950. What was the interest charged for January, and if you will, please look at the broker's statement.

A. \$122.87.

Q. From your experience was it ever the Doctor's practice to call you up on the telephone and tell you that, "My interest charge for my margin account with Fox, O'Hara last month or any month was \$122.87"?

A. No.

Q. Now on the page for January do you find a dividend of \$150 Stewart-Warner. Do you see that one, January 9th?

A. Yes.

Q. Would you now look back at the worksheet and tell me whether it is not a fact that the worksheet covered or included all of these Stewart-Warner dividends that I have mentioned, and particularly the one appearing on the page for January?

A. Yes.

Q. And that would be a clear indication, would it not, that at the time your firm prepared the return your em-

ployee had before him the January page for the Fox, O'Hara margin account?

A. I think it is fair to assume that, yes.

Q. Would you also keep before you, Mr. Sanfilippo, the other exhibits you had; that is, the margin account, the work sheet which is Exhibit T-7-B, and now the additional work sheet, T-7-A?

A. Yes.

Q. Looking at the exhibit, do you observe that the handwriting which sets up the columnar headings appears to be [fol. 103] different than the handwriting containing the information which was filled in?

A. Yes.

Q. Was it the practice of your firm to use clerks from time to time who were lacking in extensive experience?

A. Well, I don't know how to describe the lack of experience or to what extent experience is required to meet your definition. I do know that some of these men are employed after having years of experience; some are employed after having three years' experience; and some are employed right after coming out of school.

Q. And some are employed while they are still in school?

A. Yes.

Q. And was it your practice to have someone set up the worksheet or a worksheet to indicate how you wanted the work done?

A. Yes.

Q. And then the worksheet as set up would be handed to a clerk and the request would be that he or she fill it out on the basis of the material he or she had?

A. Yes.

Q. The worksheet, Defendant's Exhibit T-7-A, was set up to ascertain capital gains, was it not?

A. Yes.

Q. So that assuming I am correct that the worksheet, the bulk of it, is in the handwriting of Mr. Caputo, that would indicate, would it not, that three different people had

their hands on and worked on this worksheet, Exhibit T-7-B, is that right?

A. Yes.

Q. And then you may recall that your own handwriting appears on the pencilled copy of the 1950 return; do you remember that?

A. I believe I do, yes.

Q. So that makes at least four different people who worked on this in 1950?

A. Yes.

Q. Who supervised this?

A. Mr. Amoruso and myself.

Q. Well, did you, Mr. Sanfilippo, select the clerks and the assignment of their various and respective jobs in connection with the preparation of the 1950 return?

[fol. 104] A. There is no fixed procedure during the tax rush, which is usually a very short period, because we start preparing the returns about Washington's Birthday and they have to be completed by March 15th.

Q. And you have a great many of them?

A. And we have a great many of them, and the office staff, to a great extent, is left on their own with respect to picking up work.

We have certain baskets that are marked, "To be drafted" and another basket for "Type checking," and another basket for "Comp. checking" and so forth. And there are times when the principals are busy and the staff will pick up some of this information on their own and start to work on it. It is difficult for me to say just how this work is assigned except that we try to delegate certain people to do certain types of work.

Q. Am I correct then that from Washington's Birthday on in your office you are in what we will call the tax rush?

A. That's right.

Q. Let me see. Normally some of your men and work at the offices of clients?

A. Yes.

Q. And are they, generally speaking, the more experienced and more qualified men?

A. Yes, they are the juniors and the seniors.

Q. And then you had in the office in those days, I believe, one or two girls?

A. We had some extra help that we put on during the tax rush.

Q. And then in addition, you would sometimes get boys or girls who were still in school or college?

A. Since the Second World War it has been very difficult getting experienced help, so that we had to take some before they got through with school because of the draft situation, as well.

Q. And you would bring them in to help out in the tax rush?

A. Yes.

Q. Did you personally, Mr. Sanfilippo, go over the work of your employees in connection with preparing the Doc-[fol. 105] tor's return to see that it was complete and accurate in all respects?

A. To some extent I did.

Q. Well, what did you do in that respect? I thought you told the jury earlier in the trial that you were limited to, I think you used the phrase of, visual examination or visual review. Did you do something more than that?

A. Yes, that is the part that I am referring to now. I would make, in his particular case, a casual or a survey after having first obtained some of the information from him verbally or orally.

Q. From whom?

A. From the Doctor, verbally.

Q. You mean to say that you could make a casual observation of Defendant's Exhibit T-7-B and have the slightest idea whether it was accurate and complete or not?

A. No, that I would have to rely on my help in order to do that. My survey would be with respect to seeing that if there were similar items in prior years that they were not omitted this year, and if they were omitted to question him as to whether there should have been such items or not, and to raise other questions that would occur, depending on what I would find at the time of the survey.

Q. Well, for example, there will be reached in due course, there was an elaborate—I withdraw the word elaborate—there was a worksheet for 1951, which we will come to, analyzing the details of the Fox, O'Hara cash account.

Would you do anything yourself in 1952, for example, to check to see whether there had been a cash account in 1951, and, if so, see that you had it for 1952?

A. No, I don't believe so.

Q. There will be worksheets offered in evidence, indeed, there are some already in evidence, which I will reach in a moment, showing the preparation of an analysis of all of the defendant's deposits in his bank account, and another one showing an analysis of all of the checks in that bank account. Would you personally make any effort to see from year to year whether, for example, you had the defendant's bank account or cancelled checks?

A. It was not part of our engagement to go into the bank accounts or to make reconciliations or to do any audit. At some time or another parts of such bank accounts were submitted for some purpose, such as the computation of interest on bank loans.

Q. From Exhibit T-7, I show you two worksheets which appear to me to be a listing of all of the Doctor's deposits and all of his cancelled checks, and ask you to look at them and tell us whether the preparation of them was merely whimsical and capricious?

A. With respect to these deposits—

Q. Are they?

A. It appears to be incomplete.

Mr. Newcomb: May I ask the Court to ask the witness to answer the question?

The Court: He may answer, if he can, whether they appear to be whimsical and capricious.

The Witness: No.

Q. Did you, Mr. Sanfilippo, in any year personally make an effort to ascertain whether you had all of the cash accounts, all of the margin accounts the existence of which appeared from your own records?

A. No.

Q. Would you now please look at the 14-column spread sheet again, Defendant's Exhibit T-7-A. Do you observe that it is set out to record purchases on the lefthand side? Do you see that?

A. Yes.

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Q. And by a superficial examination you can tell us readily, I take it, that there are many purchases which are not offset by sales; correct?

A. Yes.

Q. Now, it seemed to me the other day from your testimony that it was to the effect that you only got this sort of information when you had sales.

Was that the meaning you intended to convey to the jury?

A. Yes.

[fol. 107] Q. Actually it shows on the face of this that you set up first a list of purchases; correct?

A. Yes.

Q. In analyzing a brokerage account is it not standard to follow the practice of setting up all the purchases in the account?

A. There are several methods for record-keeping of stock transactions. Most of them go into a great volume of work.

* * * * *
Q. And I take it a great volume was what you earnestly wanted to avoid when you were working for the Doctor?

* * * * *
A. We did want to avoid it because it was not part of our engagement.

Q. You did not want to do much work on this, did you?

A. That is right.

Q. And you did not do much work on it, did you?

A. We did more than we were engaged to do. This appears to be a sample of it.

Q. What were you engaged to do, as you stated?

A. To keep the transactions with respect to the real estate business only, and then file the tax returns at the end of the year based on information submitted to us by the Doctor.

Q. I take it, of course, there was no written retainer agreement between you and the Doctor?

A. No.

Q. Did the Doctor, so far as you know, have any other accountant?

A. No, not that I know of.

Q. Were you aware during the years 1948 to 1952 of the fact that no one else was acting for the Doctor in connection with his tax returns?

A. Yes.

Q. Did you tell the Doctor that you were leaving undone work that ought to be done if his returns were to be properly prepared?

A. I don't remember going into that particular discussion.

Q. Going back to Exhibit T-7-B, would you look at the item, the second item on the left, 200 Zenith Radio? Do [fol. 108] you see that? That is the 14-column sheet, Mr. Sanfilippo.

A. I think I heard you say T-7-B.

Q. I was wrong. It is T-7-A. I misspoke myself.

Do you see 200 Zenith Radio? Do you see that?

A. Yes.

Q. And you notice then squeezed in there the date 9/24/45. Do you see that?

A. Yes.

Q. And the figure \$3,922.25?

A. Yes.

Q. Right below it another date squeezed in, 9/24/45; and the figures \$3959.84?

A. Yes.

Q. This worksheet was prepared early in 1951, was it not, it being for the tax year 1950?

A. I assume so.

Q. The question occurs to me as to where you got that figure, those 1945 figures, and I ask you whether this is an instance in which it is your statement to the jury that you called the Doctor and got those figures from him?

A. I can't specifically say that that is one of them.

Q. Did you get those figures from any records which you had in your own firm in 1951?

A. I don't know where we got those figures. It may have been from confirmation from a broker; it may have been from a prior broker's statement.

Q. Which you still may have?

A. Which we may still have in our office, yes, or submitted to us at this particular time.

Q. Do you think it likely that you got any such exact figure as that from the Doctor?

A. It is possible, yes, through the confirmation—

Q. Not through. I mean orally.

A. Orally?

Q. From the Doctor.

A. Yes, it is possible.

Q. Did it happen in this case?

A. I couldn't say. If he had the voucher before him he could have read that off to us over the phone.

Q. The voucher of some six years before?

A. That is right.

[fol. 109] Q. Haven't you testified on prior occasions that you were perfectly familiar with the fact that the Doctor had substantially no records of his stock transactions?

A. But he would have broker's statements possibly—

* * * * *

Q. What records will you tell the jury did you think the Doctor had?

A. I don't know what records he had with respect to the stock transactions.

Q. Did you ever see any?

A. No.

Q. Did you ever examine any?

A. No.

Q. I am not, of course, referring to such records as brokerage statements and bank accounts and things of that character.

A. I understand that.

Q. You understand that?

A. Yes.

Q. Can you tell us, as you sit there, whether your firm had the Fox, O'Hara cash account or margin account for 1945?

A. No, I cannot.

Q. Now, would you look down, please, at the item of Minneapolis-Moline. This is on Exhibit T-7-A. Do you see an entry 200 Minneapolis-Moline, 8/21/50, being the date, 2,633; do you see that?

A. Yes.

Q. Then do you see in the middle of the page, on the same line an entry recording sale of 100 shares on 12/22/50 for \$1,715.72; do you see that?

A. Yes.

Q. And you can tell at a glance, can you not, that the clerk has erroneously attributed to the 100 shares sale the original cost of 200 shares?

A. Yes.

Q. So that the return as filed included this error?

A. Yes.

Q. So that the return reported or reflected a loss of \$917.28 when it should have reported or reflected a profit of \$339.22, is that correct?

A. Yes, sir.

[fol. 110]

New York, December 10, 1957,
10.30 o'clock a.m.

TRIAL RESUMED.

Q. Mr. Sanfilippo, I return to you Defendant's Exhibit T-7-A in evidence, and I want to go into the question of whether your firm in 1951 had in its files the defendant's cash account with Fox, O'Hara for 1945, some six years earlier, and I call your attention again to those two Zenith Radio items, being the second on the 14-column spread sheet where it appears that the date of purchase was September 24, 1945, and the exact amount of the price or the cost thereof are entered on your worksheets, the worksheets being made in 1951.

I also hand you Government's Exhibits 9 and 9-A in evidence, having been identified here, I believe, as two photostats of the Fox, O'Hara cash account as it appeared on the books of Fox, O'Hara.

The Court: For what year is that?

Mr. Newcomb: That is for 1945, pardon me, your Honor.

Q. Mr. Sanfilippo, I show you a folder which I ask to have marked Defendant's Exhibit P-7 for identification.

(Marked Defendant's Exhibit P-7 for identification.)

Q. (Continuing) And I ask you to examine it briefly and tell us whether it is the file folder and the worksheets of your firm relating to Dr. Palermo in 1945, for the tax year 1945?

A. Yes.

(Defendant's Exhibit P-7 for identification received in evidence.)

[fol. 111] Q. Do you have the seven-column worksheet, Defendant's Exhibit P-7-C, before you, Mr. Sanfilippo?

A. Yes.

Q. It appears to be a list of sales of stock, does it not?

A. Yes.

Q. Do you have any recollection about this particular sheet or this particular year?

A. No.

Q. Now, you prepared and certified—by “you” I mean your firm—the defendant's returns for each of the years 1945 to 1952, is that correct?

A. I believe we did.

Q. Now, as I see it, I think there are some 40 or more sales recorded on this worksheet. Is that roughly correct?

A. Yes.

Q. Do you see a single sale in which the worksheet shows the cost of acquisition?

A. No.

Q. If your firm had these 40-some sales; it knew, did it not, that there were taxes resulting which necessarily had to be calculated if a proper and complete return was to be filed; isn't that right?

A. Yes, if all of these figures and all of these memorandums on this sheet are more or less correct as extracted from the broker's statement.

Q. Here are 40 transactions that should have been reflected in his return, is that correct?

A. If these in fact represent sales.

Q. On the face of the worksheet, Mr. Sanfilippo, what are these set forth as?

A. They are set forth as sales of stocks.

Q. And a column is provided as set up for the purchase, isn't that right?

A. Yes.

Q. Mr. Sanfilippo, will you look at Defendant's Exhibit A-8 in evidence, the retained copy of Defendant's tax return prepared under your supervision, and tell us, please, [fol. 112] whether any of the transactions appearing on P-7-C—that is that 7-column worksheet—tell us whether any of the transactions on that worksheet were reflected in the return prepared by your firm; and, of course, you may consult any of the other worksheets in the file which you have before you.

A. It appears that this sheet is not correlated with the other worksheets and it is very difficult for me to answer that question without spending considerable time checking through each item on this sheet as against these other sheets that are summarized and the totals of which are entered on the return.

Q. In other words, it is your statement that in order to answer my question you would have to take quite a good deal of time to study the worksheets and the retained copy, is that right?

A. And check them through also as well.

Q. Did the defendant at any time during this period from 1945 to 1952 ever give you orally a list of sales, purchase-prices, salesprices, dates of acquisition and dates of sales similar to P-7-C?

A. I don't remember.

Q. Sir?

A. I don't remember.

Q. You don't remember anything like that happening?

A. I don't remember anything being submitted in writing. That was the question, as I understood it. You asked me if I remembered seeing something in writing?

Q. First, you never saw anything similar to P-7 in writing that came from the defendant, is that right?

A. I don't remember seeing anything.

Q. Did he ever give you orally over the telephone or otherwise a complicated schedule of this character, orally?

A. I don't remember how this particular statement was given to me.

Q. That is not my question. Isn't it perfectly obvious to you, Mr. Sanfilippo, that this worksheet could only have been prepared on the basis of a transcript of a brokerage [fol. 113] account?

A. It could have been submitted on that basis or—

Q. Or what?

A. Or from confirmation invoices, individual invoices, from the broker.

Q. In other words, you are satisfied, are you not, that Exhibit P-7-C was based either upon a broker's statement or the original confirmations, is that correct?

A. Or possibly from a list submitted by the Doctor.

Q. Are you telling us that Dr. Palermo ever gave you a list of sales and purchases which he had made up containing 40 or more stocks, sales, dates, acquisition, transactions to the penny?

A. I don't remember that he ever did; I don't remember that he ever didn't; I cannot say at this time.

Q. If he had ever given you any such list it would be in your work papers, would it not?

A. It would be.

Q. Then I repeat my question: Have you looked at Defendant's Exhibit B-8, the brokerage statement?

A. Yes.

Q. And Defendant's Exhibit P-7-C?

A. Yes.

Q. And are you prepared to tell us now whether or not B-8 is not the transcript of the Fox, O'Hara cash account of Dr. Palermo which your firm had before it in 1945 when it prepared schedule P-7-C?

A. (After examining) Without checking through each item, it appears that this schedule P-7-C could have been prepared from this other brokerage statement, Exhibit B-8.

(Defendant's Exhibit B-8 for identification received in evidence.)

Q. Now do these two worksheets, Defendant's Exhibits T-7-C and T-7-D refresh your recollection, Mr. Sanfilippo, that your firm received from the Doctor his complete bank [fol. 114] statements and cancelled checks for the year 1950?

A. No, it does not.

Q. It does indicate to you that your firm had at least some of his bank statements and cancelled checks?

A. Yes.

Q. Now, is it not a fact that during the years 1948, 1949, 1950 and 1951 it was the Doctor's regular practice to send to your firm his bank statements and cancelled checks?

A. No.

Q. Do you remember the bank statements and cancelled checks that are referred to in Exhibits T-7-C and T-7-D which you have before you?

A. I don't remember these in particular.

Q. Do you have any recollection as to how these bank statements and cancelled checks got to your firm?

A. Yes; my recollection is that they were submitted to us to establish the interest charges in connection with bank loans by the National City Bank.

Q. When did that happen?

A. Throughout the years 1950—

Q. He would send them down to you periodically, correct?

A. I am not sure of that. I think they were all submitted at one time.

Q. Did you ask the Doctor for them?

A. I don't remember whether we asked for them or whether they were submitted voluntarily.

Q. Is it your statement to the jury that the sole purpose of all this, of these bank statements, was to get the interest?

A. Yes.

Q. You could get that from the bank statements without the cancelled checks, could you not?

A. We could have, but evidently these were submitted to us and we used them while we had them. * * *

[fol. 115] Q. Mr. Sanfilippo, you started to say, did you not, a few moments ago that these were submitted to you throughout the years. As I heard it you used the word "throughout," did you not?

A. No.

Q. And then you paused and said that you now remember that they were all submitted at one time. Now do you have any recollection, genuine recollection, of when and under what circumstances your firm received the 1950 bank statements and cancelled checks?

A. My best recollection is that we received these all at one time.

Q. Where?

A. At our office at the end of the year or subsequent to the end of the year for the purpose of establishing the interest charges on the bank loans.

Q. Did you receive the cancelled checks and bank statements for 1949?

A. Not that I remember.

Q. For 1951?

A. Not that I remember.

Q. For 1952?

A. They were in connection with the examination.

Q. No, I am talking about prior to the preparation of his tax return in 1952.

A. Yes.

Q. And did you use the bank statements and cancelled checks in connection with the preparation of his return?

A. No.

Q. I take it you knew he was under tax investigation when you were preparing the 1952 return; correct?

A. Yes.

Q. And you are telling the jury that you had all his bank statements and cancelled checks for 1952 and you never looked at them for assistance or use in connection with the preparation of his return?

A. I would not say that we didn't look at them. We may have looked at them but we were not engaged to make a complete audit of a bank account which involves much additional work; bank record reconciliations and other procedure, including listing in cashbooks or analysis sheets,

all of which involved more work than we were engaged to [fol. 116] do, and that was the general procedure with respect to these broker's statements and other papers that were submitted from time to time.

The Court: You say that the sole purpose of the checks and statements was to get the interest?

The Witness: Yes, your Honor.

The Court: Well, doesn't T-7²C indicate that the checks were used to build up the items for taxes and rent and things of that sort?

The Witness: It appears that they were used, yes, your Honor.

By Mr. Newcomb:

Q. And before we leave those particular exhibits, is it not obvious from the place of the one relating to the recap of checks that the clerk in your office examined each of the original checks and wrote down the names of the payors and the amounts and the dates?

A. I would say so.

Q. Will you tell the jury what if anything that has to do with the interest on the bank loan?

A. Well, I tried to explain—

Q. No.

A. I cannot answer—

Mr. Newcomb: May I ask the witness to be directed to answer the question as to what that has to do with the interest?

The Court: Yes. If you have explained that before, you may explain it again.

A. The reason for the analysis sheets that we have here was to assist in the preparation of the tax return. The data submitted here, cancelled checks or vouchers, whatever they may have been, were used in this particular instance because they were submitted to us. It was not our usual custom. And also this does not give me any indication [fol. 117] that we had all his cancelled checks for the year 1950 or vouchers.

Q. Will you give us the exhibit number of the one you are holding in your hand when you said "this".

A. T-7-C.

Q. Mr. Sanfilippo, I hand you Government's Exhibits 78 to 89 inclusive, the defendant's margin account with Fox, O'Hara for 1950. Would you turn to the next to the last page where there appears an item that I want to question you about. Do you see an item under date of November 21st, 100 Eversharp "From cash account"?

A. Yes.

Q. And it reads, "100 shares Eversharp 'From cash A/C'" and then the word "Recd.", evidently meaning "received". Will you tell the jury what that entry indicates to you as an accountant? Do you see the entry?

A. Yes. Well, it appears from this that on November 22nd, there was a purchase made into this account.

Q. Doesn't that entry mean that 100 shares of Eversharp were received into the margin account from a cash account of the Doctor's of the same company; isn't that right?

A. Yes, that could be the transfer and the payment of the amount into the cash account.

Q. And that would be notice to you, would it not, of the existence of a cash account?

A. Yes.

Q. Did you ever ask for the cash account in 1950?

A. I don't remember asking for this specifically, no.

Q. Do you remember that it was the Doctor's practice from time to time to send you a cash account?

A. Not that I recall.

Q. As well as a margin account?

A. Not that I recall.

Q. Do you have any recollection that he did not send you his cash account?

A. That is my recollection...

Q. Did you ever tell the Doctor that without his cash account you could not make up a complete, accurate and correct return?

A. I don't remember saying that to him.

[fol. 118] Q. May we safely assume that, so far as you can remember, you never asked the Doctor for his cash accounts, and, so far as you know, you never received a cash account, and you never told the Doctor that you couldn't make a complete return without it; is that accurate?

A. Partially.

Q. I am sorry, I put three questions in one. Suppose I break it down.

A. Yes, please.

Q. So far as you know and so far as you can recall you did not have the cash account?

Mr. McHugh: May we have the time fixed?

Q. From 1948 to 1952 inclusive, for the tax years.

A. As far as I can remember we did not have it for the purpose of arriving at the dividends—

Q. I didn't ask you what the purpose was; I asked you whether you had them?

A. We had some at some time or other, yes.

Q. Did you tell the Doctor when you received this cash account, whether you understand it was for the limited purpose of this, that or the other thing, did you tell him that you were not going to do a proper tax job on the basis of the cash accounts he gave you?

A. I don't remember that.

Q. Did you ever tell him that?

A. I don't remember telling him specifically that.

Q. Now, Mr. Sanfilippo—

A. I don't remember mentioning that information specifically that you mention.

Q. You swore to the return every year, and I want a definite answer, if I can get it. Is it not a fact that you never told the Doctor that you were not going to do a proper job on his tax return including therein whatever he sent you?

A. I don't remember.

[fol. 119] Q. All right, sir. Now then we will talk a little about banking practice.

You knew that the Doctor had a substantial loan at the National City Bank, is that correct?

A. Yes.

Q. And you knew that as collateral therefor he had pledged various stocks owned by him, is that correct?

A. Yes.

Q. Where a bank loans money and it is secured by common stock, to whom are the dividends paid, if dividends are paid on the stock?

A. To the registered owner.

Q. So that if the Doctor had a loan at the bank, at the National City, and stock was pledged, you were aware of the fact that the dividends on that stock would go to the doctor?

A. Yes.

Q. You also knew that the Doctor had what is sometimes called vault stock, namely, stocks held by him in his own name, registered in his name, but not pledged anywhere, is that correct?

A. I was aware of that at some time; I don't recollect when I was first aware of it.

Q. But you were aware of it during at least some of the tax years here under consideration?

A. I was not sure I was aware of that until after the examination.

Q. Mr. Sanfilippo, are you telling this jury that you never knew until after the tax investigation began that Dr. Palermo owned stocks which were not pledged in any margin account and were not pledged with any bank?

A. I had no definite knowledge of such information.

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Q. Did you at any time prior to November 3, 1952, have any awareness of the approximate size of the defendant's loans with the National City Bank and the Corn Exchange?

A. Yes.

Q. Were you aware of the fact that they were substantial?

A. My recollection is that they were in approximately of the amount of \$60,000.

[fol. 120] Q. And then did they grow larger to your awareness?

A. I don't recall that.

Q. You were aware of the fact, were you not, that these loans were secured by common stocks?

A. Yes.

Q. Mr. Sanfilippo, in the worksheets which make up Defendant's Exhibit Q-7 in evidence, I ask you if you find a small memorandum slip in the handwriting of Carrie Artino. Do you see one in those worksheets?

A. Yes.

Q. And do you observe that it is dated 12/11/46?

A. Yes.

Q. Would you read to the jury, if you please, the file designation or description of these worksheets which are Q-7?

A. "Dr. A. Palermo, audit for year 1946."

Q. Now, in the handwriting of Miss Artino on this slip do you see the name Rosina Palermo?

A. Yes.

Q. And does it contain a notation "Get statements Fox, O'Hara covering January 1946 to March 1946 and July to present date"?

Do you see that?

A. Yes.

Q. Do you recall instructing Miss Artino that in connection with the preparation of the Doctor's return she should get the Fox, O'Hara statements for Rosina?

A. I don't remember that.

Q. Mr. Sanfilippo, I show you from Exhibit Q-7 a 14-column worksheet entitled "Mrs. Rosina Palermo." Do you see that?

A. Yes.

Q. And in whose handwriting are the figures of the date "1946"?

A. It could be mine; I am not sure.

Q. And in whose handwriting is the notation to which I am pointing, "Dividend received \$30"?

A. It appears to be mine.

Q. And am I correct that the balance of the document appears to be in the handwriting of Miss Artino?

A. Yes.

[fol. 121] The Court: Did you say that the handwriting "Dividend received \$30" appears to be in your handwriting?

The Witness: Yes, your Honor.

(Received in evidence and marked Defendant's Exhibit Q-7-C.)

Q. Do you have before you the worksheet, the 14-column worksheet, relating to Mrs. Rosina Palermo? Do you have that before you?

A. Yes.

Q. Will you tell the jury what it is.

A. It appears to be a schedule of a cash account with Fox, O'Hara.

Q. In the name of Rosina Palermo?

A. That's right.

Q. Do you observe that it sets forth sales and purchases?

A. Yes.

Q. All of the transactions on this sheet, in fact, are short-term capital gains or losses, is that right?

A. Yes.

Q. Now the total proceeds of sales was \$23,029.39. Do you see that?

A. It appears to be 23,027.39.

Q. I am sorry, 23,027.39. Do you see that?

A. That's right.

Q. And under the tax laws as they were at the time, did you not know, as a certified public accountant, that a return, an income tax return, was required to be filed by somebody on account of these transactions?

A. Yes.

Q. Mr. Sanfilippo, will you take Q-7-B. In whose handwriting, Mr. Sanfilippo, are the columnar headings?

A. They appear to be mine.

Q. And do you see a notation "Fox, O'Hara Cash Account"?

A. Yes.

Q. Would you tell the jury what, if any, efforts you recall making to check to see whether your firm had the [fol. 122] complete Fox, O'Hara cash account?

A. I don't recall making any special effort to see that any statements were presented to us.

Q. As a certified public accountant will you tell the jury whether you could make up an accurate, complete and correct tax return without transcripts or brokerage accounts of which you had knowledge?

A. I could if the information was submitted to me.

Q. That is, if you got the information orally from the Doctor you could do it?

A. Yes.

Q. And if you didn't have the confirmations and you didn't have the account, the only way you could do it would be to get information from the Doctor?

A. Or get other statements and the documents to substantiate the entries.

The Court: You mean as a basis for making the entries?

The Witness: As a basis for making the entries we would require all of the pertinent data, and if we were to make an audit we would require also confirmations. Other than that the data could be prepared and was prepared from information submitted to us, and without audit, without verification.

The Court: Do you say that to make up an accurate return you would either have to have transcripts of all the accounts of which you had knowledge, or else information from your client, or else other statements which would make a basis for your entries?

The Witness: Well, if I said that I didn't mean that. Statements would be required only where we were making a detailed—or an audit of the transactions. Where the information is submitted we would not make any substantiation other than assist the client if he submitted any papers to us.

[fol. 123] The Court: So that in this kind of job the only two sources would have been the broker's statements or else information from the client?

The Witness: Yes, your Honor.

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Q. As I understand it, no returns were ever filed on behalf of Mrs. Rosina Palermo so far as you know during the years 1945 to 1952?

A. As far as I can remember, that is so.

Q. And I take it you know that the \$23,000 appearing on Defendant's Exhibit Q-7-C in evidence was not included in the Doctor's return prepared by you or by your firm?

A. I cannot determine that from the information at hand.

Q. Will you look at the retained copy of the return in front of you, which I believe is Defendant's Exhibit E-8, and tell the jury whether by examining it you can tell them whether or not it included the \$23,000, proceeds of short term sales of Rosina Palermo?

A. It does not appear to be.

* * * * *

Q. Did there come a time when you learned that the defendant's tax affairs were under investigation by the United States Government?

A. Yes.

Q. From whom did you first learn that?

A. I am not sure, but I believe it was my associate.

Q. Mr. Amoruso?

A. Yes.

Q. I show you what has been marked Defendant's Exhibit C-6 for identification and ask you if you recognize any of your handwriting thereon?

A. Yes.

Q. And do you recognize that the upper portion of it is in the Doctor's handwriting?

A. I am not sure.

Q. Well, in any event, you recognize your own handwriting on it?

A. Yes.

Q. Now, is exhibit C-6 for identification, a notation, a pencilled memorandum, that was handed by the Doctor to you relating to his tax case?

A. I believe it was.

* * * * *

[fol. 124] Q. Mr. Sanfilippo, referring again to Defendant's Exhibit C-6 for identification, did you speak to the

Internal Revenue people on Dr. Palermo's behalf in connection with the tax investigation and thereupon make the notation which appears on Defendant's Exhibit C-6?

A. Yes.

Q. And did you speak to them by telephone or in person?

A. I don't recall. It was either in person or by phone.

Q. You later came to know Mr. Mishler?

A. Yes.

Q. Was it Mr. Mishler that you spoke to in connection with the notation which appears on Exhibit C-6?

A. Yes.

Q. Can you tell us when you spoke to Mr. Mishler?

A. I believe it was sometime in January or February of the same year.

Q. Of 1953?

A. 1953.

Q. Now will you tell the jury to the best of your recollection the conversation you had with Mr. Mishler sometime in January or February to which this notation in Exhibit C-6 refers?

A. As best as I can remember it had to do generally with the fact that he was busy at the particular time, and so were we, and we wanted to extend this examination to a period or a date after March the 15th.

Q. Was that the general substance of it?

A. Yes.

Q. Do you recall anything else that was said in the conversation?

A. No, except that we would have the material ready for him at that time.

Q. And did you ask him to adjourn the examination?

A. I am not sure whether he asked me or whether I asked him.

Q. But, in any event, it was agreed that the matter would be put over?

A. Yes.

Q. Do you recall anything being said by Mr. Mishler to the effect that extra care should be used in connection with the preparation of the 1952 return?

A. No.

[fol. 125] Q. Do you observe on this exhibit a date and some figures—which I will not read, the exhibit not yet being in evidence—do you see that?

A. Yes.

Q. Did you have a conversation with the Doctor on or prior to the time when you called Mr. Mishler about the tax case?

A. I believe we did have a conversation.

Q. What did the Doctor tell you?

A. I have a faint recollection it was a question of some information returns that were in the possession of the agent that weren't reflected in the tax returns.

Q. Which tax return?

A. The tax return under examination, namely, the year 1951.

Q. Where did this conversation take place?

A. I don't remember; either over the phone or at my office.

* * * * *

Q. Now let me go back then and straighten that out. Did you have a conversation with the Doctor about the fact that he had seen the Internal Revenue people?

A. Yes.

Q. Where did that conversation take place? And I now refer to the first one.

A. I don't remember whether it was by phone or at his office.

Q. And by his office you are talking about 408 West 145th Street?

A. Yes.

* * * * *

Q. The record here, Mr. Sanfilippo, shows that Mr. Mishler questioned the Doctor on December 16, 1952, and my question to you is, how soon after the Mishler-Palermo conversation did the Doctor tell you about it?

A. Well, my recollection is that nothing happened before December 1952, and it is possible that you mean February 1953 and not February 1952, but with respect to the conversation with the Doctor, it was some time in January or February, and I cannot definitely place the time or place.

[fol. 126] Q. Whenever it was, what did the Doctor tell you?

A. He explained that there were some questions raised with respect to dividends and that I was to take over this case and go through with the examination.

Q. Did he tell you that it was a Mr. Mishler that he had seen?

A. Yes.

Q. Did he tell you in substance that Mr. Mishler had told him that the Government had reports from corporations and brokers indicating unreported dividends of at least \$20,000?

A. Yes.

Q. And did he tell you that the Government wanted certain records and asked him, the Doctor, to arrange to provide certain records?

A. Yes.

Q. And did he tell you that they wanted his brokerage statements for 1951?

A. Yes.

Q. Now do you observe at the upper righthand corner of Exhibit C-6 a notation in Mr. Amoruso's handwriting?

A. I can't distinguish it from the other writing.

Q. Did he ask you, Mr. Sanfilippo, or did the Doctor tell you, that they wanted a schedule of his stock transactions?

A. Generally that is what my understanding was. I don't remember the particular language, the particular schedules that he requested.

Q. Now that we have gone over this and I have asked you these questions, are you now satisfied that the upper portion of Exhibit C-6 is a memorandum handed to you by the Doctor, and that the lower portion is what you wrote on it yourself after you had called Internal Revenue to obtain a postponement?

A. Yes, sir.

Q. Mr. Sanfilippo, I show you a document which has been marked B-6 for identification and ask you if it is an original longhand letter from Agent Mishler to Dr. Palermo which Dr. Palermo turned over to you?

A. Yes.

[fol. 127] (Defendant's Exhibit B-6 for identification received in evidence.)

Q. Mr. Sanfilippo, is the material in the lower lefthand corner in your handwriting?

A. It appears to be, yes.

Q. Now this letter asks the Doctor to sign an enclosed consent form 872. Would you tell the jury what that is, what a form 872 is?

A. It is an extension agreement, extending the statute of limitations.

Q. Extending the statute of limitations on recovery of a tax, is that it?

A. For examination of recovery of tax, yes.

Q. And did you instruct the Doctor to sign the extension or a waiver of the statute of limitations?

A. Yes.

Q. Mr. Sanfilippo, I show you what is marked Defendant's Exhibit A-6 in evidence and ask you if it is a copy of a letter which you drafted to be sent to the Bureau of Internal Revenue to the attention of Mr. Mishler asking for a field audit?

A. It is a copy either drafted by me or suggested by me, that I knew and that I requested be sent to the Department in connection with the examination.

(Marked Defendant's Exhibit A-6.)

By Mr. Newcomb:

Q. Now, Defendant's Exhibit A-6 was a form letter, was it not, used regularly by your office in asking for field audits?

A. No, I believe it was either dictated or we told him what to say, or I told him what to say, in substance. We don't have any such form letter.

Q. Well, I take it that you were the one that was the draftsman responsible for the language used; that is all I am asking.

A. To my best recollection I did.

[fol. 128] Q. Bearing in mind, Mr. Sanfilippo, that the powers of attorney were executed or dated January 15th and January 16th, and looking at Exhibit C-6, indicating

that you got an adjournment until March 16, would you tell us, please, when you talked to Mr. Mishler for the first time?

A. My best recollection is that it was sometime in the middle or the beginning of January.

Q. Would you say it was before you actually had your powers of attorney?

A. Yes.

Q. So they would be before January 16th or 15th?

A. Somewheres in there.

Q. When did you see Mr. Mishler face to face the first time?

A. I am not sure whether I saw him in January, February or April of 1953.

Q. Did you see Mr. Mishler face to face at any time prior to the preparation of the 1952 return?

A. I am not sure.

Q. Mr. Sanfilippo, as to whether you saw Mr. Mishler prior to the preparation and filing of the 1952 return, may I call your attention to Exhibit C-6, and a notation indicating that you got a postponement from him until March 16th? Does that refresh your recollection and bring back a recollection that, in fact, you never saw Mr. Mishler face to face until after the preparation of the 1953 return?

Mr. McHugh: Is that the 1952 return, sir?

Mr. Newcomb: Pardon me, the 1952 return prepared in 1953.

Thank you, Mr. McHugh.

A. I have no accurate recollection as to the date of the first meeting. The January or February dating is mostly given with respect to the fact that we had a conversation. It may be face to face; it may have been a phone conversation. Other than that I cannot say.

[fol. 129] Q. May I put it this way: Prior to March 16, 1953, is it accurate to say that whether your talk with Mr. Mishler was on the telephone or face to face, it dealt only with the subject of adjournment?

A. Substantially, yes.

Q. He said he was busy, as you knew he was, and you said you were busy, as you knew you were, and you both agreed to put it over?

A. Yes.

Q. Under these powers of attorney you undertook, did you not, to represent the defendant in the pending tax case?

A. Yes.

Q. Did you tell the defendant that you were not competent or qualified to represent him properly in the tax case?

A. No.

Q. Did you tell the defendant that it would be unethical or improper for you to represent him in the tax case?

A. No.

Q. Did you tell the defendant that there might arise in the tax case a conflict of interest between him and you?

A. Not that I recall.

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Q. Did you ever make an analysis, study, investigation, during your representation of the defendant to see how many errors your firm had made and how much they amounted to? Did you ever try to do that?

A. I don't recall.

Q. Did there come a time when you recommended counsel to the defendant, that he retain an attorney?

A. Yes.

Q. And did you recommend a firm called Higgins, Brenner & Higgins?

A. Yes.

Q. Did you ever tell Higgins, Brenner & Higgins of the errors and omissions due solely to the accounting and clerical errors of yourself and your firm?

A. I don't remember discussing anything in detail.

Q. Did you at any time while Higgins, Brenner & Higgins were in the case tell them that your firm had been [fol. 130] negligent in the preparation of the Doctor's returns?

A. No.

Q. Did you ever at any time while you were a representative of the defendant in the tax case tell the Government that your firm had been negligent in the preparation of the Doctor's returns?

A. No.

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New York, December 11, 1957,

10.30 o'clock A. M.

Trial resumed.

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Mr. McHugh: I furnished defense counsel with the dates of contacts between Mr. Mishler and the witness, Sanfilippo, according to our information, if your Honor please, and they are as follows:

On December 19, 1952 there was a phone call. Some time prior to April 17, 1953, and that is as definite as we have it, there was a phone call or calls, and finally on April 17, 1953 there was a conference between those two men at the Sanfilippo offices.

Cross examination (Continued):

By Mr. Newcomb:

Q. Mr. Sanfilippo, I show you a folder of worksheets which I have requested the clerk to mark as Defendant's Exhibit V-7 for identification.

(Marked Defendant's Exhibit V-7 for identification.)

Q. I ask you to examine it and tell the jury whether it is your firm's collection of worksheets prepared in connection with the defendant's tax return for the year 1952.

A. (Witness examines.)

Q. What is your answer?

A. Yes.

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[fol. 131] Q. And will you read to the jury how you designated this file of work papers on the face of the folder; would you read that to the jury?

A. "Dr. A. M. Palermo, audit and closing as at December 31, 1952."

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(Marked Defendant's Exhibit V-7 in evidence.)

By Mr. Newcomb:

Q. Mr. Sanfilippo, from Exhibit V-7 I show you a worksheet entitled "Stock Transactions Fox, O'Hara 1952," and ask you if you recognize any of the handwriting on it?

A. Yes.

Q. In whose handwriting is the bulk of the exhibit, do you know?

A. No, I don't recognize it.

Q. But what you do recognize are some notations by Mr. Amoruso?

A. That is right.

Q. It is, however, a worksheet relating to the dividends of the Doctor for that year, correct?

A. Yes.

(Marked Defendant's Exhibit V-7-F in evidence.)

Q. Defendant's Exhibit V-7-F sets forth the dividends by companies, does it not?

A. Yes.

Q. And am I correct that in doing this sort of work the clerk takes the margin account and goes through it looking for dividends?

A. Yes.

Q. And when he finds dividends on the margin account he sets them up on his worksheet as it is done here?

A. That is right.

Q. Do you remember giving anyone any instructions as to how this should be done in 1952?

A. Not particularly, no.

[fol. 132] Q. Do you remember supervising the work in the sense of checking over this worksheet?

A. I don't remember going over this sheet in particular.

Mr. McHugh: If your Honor please, may I ask one question or two in the voir dire about this?

The Court: Yes.

By Mr. McHugh:

Q. Does that refresh your recollection as to whether or not your firm got this return—I am sorry, got this first page of the 1952 brokerage statement before the worksheet was prepared or after?

A. It appears that this first statement, that this first report, was not present or available at the time that this schedule was prepared because of the fact that it omits not only that dividend item but also the item of interest which is noted on this page, and our schedule shows an estimated figure for that month.

By Mr. Newcomb:

Q. Mr. Sanfilippo, tell the jury whether in the case of a margin account if any page is missing an accountant can readily tell it?

A. If he were making a detailed audit or a comprehensive audit, he would.

Q. In a margin account we have a debit balance which runs from month to month?

A. Yes.

Q. And it changes every month, does it not?

A. It may.

Q. Well, even if you have no trading you have interest charges?

A. That's right.

Q. So that you get some kind of a change normally every month?

A. That's right.

Q. * * * One possibility is that you did not have that page at the time the return was filed; correct?

A. Correct.

[fol. 133] Q. Now if that happened, then your firm, as accountants, certified a return which they knew to be incorrect; isn't that right?

A. No.

Q. Am I not correct that when you are dealing with a margin account, even a student accountant knows he has to check the debit balances to see if he has all the papers?

A. I cannot recall this particular transaction, this particular entry. I can say that the man may have exhausted the possibilities of getting all these figures, and not having any information that there definitely were any income items for the month of January, based possibly on inquiry, that he went ahead without that one page, or he may have made an error and omitted it. One or the other of those possibilities evidently happened here.

Q. Now, in discussing these possibilities, if that is what your man did, then it was incorrect accounting procedure, isn't that right?

A. I wouldn't say it was incorrect. I would say it was merely an error made. Because of the fact that there is no audit made of these records, errors are apt to happen and they can go undetected.

Q. Now, of course, the estimated \$240 in that exhibit, if it was an estimate, was also incorrect?

A. The amount appears to be small as compared to all the other figures, and an honest effort is made—

Q. I am not talking about the amount of the difference. It was not the interest of the Doctor was charged that month; correct?

A. It is not, but it is very close to it.

Q. And the accountant was putting down a figure which he made up out of his head, isn't that right?

A. I don't know. I can't say that.

Q. Well, did your firm have a practice of using your own estimates—

A. No.

Q. —of what the figures should be as distinguished from what the figures actually were?

A. No.

Q. Sir?

A. No.

[fol. 134] Q. Did you use estimates, for example, as to the Doctor's medical income?

A. No.

Q. Did you use estimates as to the Doctor's expenses?

A. No.

Q. Is your testimony under oath to the jury that in connection with the preparation of the Doctor's returns your firm never used mere estimates?

A. To the best of my knowledge and recollection, that is so.

Q. Now I was dealing with the first possibility, namely, that you did not have the sheet for January. A second possibility would be, would it not, that your clerk did not have the sheet for January at the time you made up the schedule, but later obtained it before tax filing time and omitted to correct the schedule; that is the second possibility.

A. It is a possibility although very—not apt to happen.

Q. And if, of course, that happened it was completely improper accounting, is that right?

A. Subject to errors I would say that it would be improper if knowingly he did it.

Q. And a third possibility was that your firm had the sheet in your office, but that in the rush of tax time it was temporarily misplaced; that is a third possibility, is it not?

A. Yes.

Q. And, as a matter of fact, was it not the practice of your office to keep a file for the Doctor? Is that right?

A. Yes.

Q. Did you have any filing clerks?

A. Yes.

Q. Did you have any filing records or filing system?

A. Yes.

Q. Your system was to put everything relating to the client in the drawer; that was the extent of the system, wasn't it?

A. The file drawer, yes.

Q. You have told us previously that you never made any effort to see whether the files were complete and that you never instructed anyone to do so. Now, did you have [fol. 135] any record of what you received from the Doctor?

A. I don't know what we received. We didn't make any listing of it. As to the other question—

* * * * *

Mr. Newcomb: I didn't mean to interrupt you.

Did you have anything further you wanted to say?

* * * * *

The Witness: No, but with respect to the question of looking through the files myself or instructing members of

my firm to look through the files, I don't specifically remember that I told anyone not to look. All I did know is that I don't remember actually looking in those files or asking anyone to look in there.

In other words, there is a very good possibility that I may have told some of my help to look in the file and get all the papers out with respect to that particular year that we were working on.

Q. Well, did you tell anyone in your firm, Mr. Sanfilippo, not only to get out the papers and look at them but to make sure that you had all the brokerage accounts and statements, for example, that were indicated by the papers?

A. I don't remember at this point what I actually told them to do.

Q. Going back to this first page and our possibilities, do you not recall that it was the Doctor's practice to send down to you his brokerage statements from time to time during the year?

A. I remember that there was no fixed policy. He would send them down occasionally every two or three months, and then again he would not send them down for a whole year.

Q. But the point I am making at this moment is that in the ordinary course of the relationship you would receive his brokerage statements in installments and not altogether [fol. 136] at the same time; is that correct?

A. That happened at times.

Q. And so the girls or the boys in the office, when it came tax time, would have to try to find all of the pages if they could find them?

A. That is right.

Q. And didn't the boys and the girls in the office from time to time during the years 1945 to 1952 inclusive, come to you upon occasion and say to you in substance, "Mr. Sanfilippo, we can't do the complete job because we need such and such an account"?

A. Yes.

Q. And did it happen that by the time tax filing time came around, despite the fact that they had requested it, they still didn't have the information?

A. That is possible.

Q. Now looking at this sheet of Mr. DeGeorge's, and calling your attention to the \$240 on the interest column, it is obvious, is it not, that what your clerk did was, he set out the 11 items, omitting or ignoring the 240 at the top; he started with February, didn't he?

A. That is right.

Q. And, of course, the 240 indicates that he realized he had a page missing, right?

A. Evidently.

Q. What?

A. Evidently.

Q. Is January known to all accountants of any competency to be one of the heaviest months of the year for the payment of dividends by corporations listed on the stock exchanges?

A. Not to my knowledge.

Q. You don't know that?

A. No.

Q. Did you during the years 1945 to 1952 have any stock brokers as clients? Let us take brokerage firms first.

A. I don't remember whether I had any in that period or not.

Q. Did you have any in 1948 to 1952?

A. No.

Q. During the years 1945 to 1952 did you have as a client any person other than Dr. Palermo who traded extensively on the stock exchange?

A. I had clients that traded on the stock exchange. Not extensively.

[fol. 137] Q. Sir?

A. I had clients who traded on the stock exchange but not extensively.

Q. Is it not a fact that Dr. Palermo was the only client you had who had stock market transactions of either this volume or this complexity?

A. I believe so.

Q. Did you have anyone in your office who had a substantial experience in handling stock market trading from a tax and an accounting standpoint?

A. No.

Q. And I take it that you yourself did not have sub-

stantial experience in handling extensive stock market trading from an accounting and tax standpoint?

A. Well, that is a very difficult question for me to answer.

Q. I did not ask you whether you were skilled at it, sir, or whether you were a fine accountant or not. I asked you merely whether you had had substantial experience in handling the accounting and tax aspects of extensive trading in the stock market?

A. In terms of volume, no.

Q. And the volume, of course, from the standpoint of accounting and tax analysis makes the accounting a tax job much more complex and onerous, does it not?

A. Yes.

Q. Do you know when Mr. DeGeorge prepared this work?

A. Not exactly; it was sometime in February or March of 1953.

Q. After Washington's Birthday?

A. Approximately, yes; sometimes we made exceptions for people that had to go away and started working on them before Washington's Birthday.

Q. When you gave that last answer you were thinking of the fact that the Doctor was down South, were you not?

A. No, I am just thinking of the fact that there are exceptions to the rule, February 22nd is usually our heavy, the beginning of our very heavy season, but there are stragglers that come in before February 22nd.

Q. Was the Doctor one of the stragglers?

A. I don't remember.

[fol. 138] Q. You testified on your direct examination that in 1952 your firm prepared the return on the basis of the figures submitted by the defendant. We have this morning dealt with dividends totalling \$4157.50, more than half or approximately half of the difference between the amended return and the original return.

On the basis of the evidence that we have reviewed this morning, would you not say that the omission of \$4157.50

in dividends from the Doctor's return of 1952 was due to the accounting errors and omissions of your firm?

A. Yes.

Q. Mr. Sanfilippo, I am going to show you and give you now Government's Exhibits 286 to 293 inclusive, which are in evidence as the broker's records of the Newburger, Loeb margin account of Dr. Palermo for the year 1952.

May I have separately marked the worksheet, which is already in evidence as part of Exhibit V-7, which relates to the Newburger, Loeb margin account for 1952, and ask that it be marked V-7-G.

Q. I now hand you Defendant's Exhibit V-7-G and ask you if it is a worksheet of your firm relating to the Newburger, Loeb account for 1952?

A. Yes.

Q. And at the very top do you observe where the words "Stock Transactions" were set up as the heading and later changed or stricken out? Do you see that?

A. Yes.

Q. And do you recognize the somewhat distinctive handwriting of your partner, Mr. Amoruso?

A. The word "Dividend" alongside that appears to be his, yes.

Q. You say that word is dividend?

A. "D-i-v."

Q. "D-i-v"?

A. That is right.

[fol. 139] Q. Now will you direct your attention, if you will, to the page of the margin account which you have before you for February and look to see if you can't find an item involving Eversharp in the amount of \$70 where the entry is "Check Eversharp, Inc. \$70."

The Witness: Yes. The date is not very clear on this first sheet.

Q. I trust you were aware of the fact that Dr. Palermo was not employed by Eversharp, Inc.?

A. Yes.

Q. So he got a payment, according to the exhibit in evidence, from Eversharp in the amount of \$70. That is obviously a dividend, isn't it?

A. I wouldn't know.

Q. Let us go on. Let us look under April 2. Do you see an item there "Check Electric Autolite Co."? Do you see that item?

A. Yes.

Q. I trust you were aware of the fact that the Doctor was not employed by Electric Autolite Company?

A. Yes.

Q. And that it is obviously a dividend, isn't it?

A. It is not clearly indicated.

Q. Well, let us see. Where you have a margin account dividends can come into it in not one but two ways, can they not, as follows: The dividend may be paid on the stock that is held by the broker in the Street name and thus come into the account, is that right?

A. Yes.

Q. And then another way is that the client, the customer, the Doctor may receive a check from Eversharp on stock held by him which is not in the margin account?

A. Yes.

Q. And he can deposit that dividend check in the margin account?

A. Yes.

Q. And when he does that you get the entry or an entry "Check Electric Autolite Co."; isn't that right?

A. Yes.

[fol. 140] Q. Then going back to pick them up in chronological order, look at January, please. That is Exhibit 286, I believe. Do you see that?

A. Yes.

Q. Now do you see an item "Check Motorola, Inc. 1400"?

A. Yes.

Q. And I take it your firm was aware of the fact that the Doctor was not employed by Motorola?

A. Yes.

Q. Now look at April 3, please, for an item of the same character involving J. I. Case.

Do you find a J. I. Case-item, \$780?

A. Yes.

Q. And your firm was aware of the fact that he was not employed by J. I. Case?

A. Yes.

Q. Now look at April 3, same page. Do you find an item of "Check, The Emerson Electric Mfg. Co."; do you see that?

A. Yes.

Q. \$210?

A. Yes.

Q. Right?

A. Yes.

Q. Well, looking at Exhibit V-7-G, the worksheet before you, there is a column for Motorola, is there not?

A. Yes.

Q. You don't find any \$1400-dividend in it?

A. My schedule shows the \$75.

Q. That is right. Do you find any section at all for, example, the Emerson Electric on this worksheet?

A. No.

* * * * *

Q. So that the jury will understand it and all of us, is this correct: That there were made up three original schedules: One for the Newburger, Loeb margin account, one for the Fox, O'Hara margin account, one for the Doctor's personally-held stock, and then after that work had been done, all of them, or the facts stated thereon, were summarized into this master schedule?

A. Yes, apparently so.

[fol. 141] The Court: Are there sub-numbers for the worksheets and the master schedule?

Mr. Newcomb: I am coming to that right now.

May I now, if the Court please, have separately marked as Exhibit V-7-E the worksheet for the personally-held stock. It is already in evidence, but I am simply asking that it be separately marked.

(Marked Defendant's Exhibit V-7-E.)

Mr. Newcomb: And I ask that there be separately marked as V-7-D a schedule entitled "Master Schedule of Dividends and Interest."

(Marked Defendant's Exhibit V-7-D.)

Q. Mr. Sanfilippo, let us start first and look at the schedule entitled "Master Schedule of Dividends and Interest," which is Exhibit V-7-D. Do you see that?

A. Yes.

It would reveal, would it not, all of the Motorola dividends set forth or revealed in the analysis relating to the Fox, O'Hara margin account, Exhibit V-7-F, and all Motorola dividends appearing in the Newburger, Loeb margin account analysis, V-7-G, and all of the Motorola dividends appearing in the analysis of personally-held stock, Exhibit V-7-E? Is that accurate?

A. Yes.

Q. Looking at Exhibit V-7-D, the master schedule, do you find the \$1400 dividend of Motorola?

A. No.

Q. Is there any doubt in your mind, Mr. Sanfilippo, that we are talking about dividends?

A. I know we are talking about checks being received into the account.

Q. I am asking you very straightforwardly, is there any doubt in your mind that what we are talking about are dividends?

A. I am not sure that they are dividends.

[fol. 142] Q. He was not employed by any of these companies, was he?

A. No.

Q. And if he owned stock in these companies and sold the stock, it would not have resulted in a check from the company, would it?

A. No.

Q. So he had something to do; he was having a transaction relating to stock and it was not a sale of the stock

and it was not compensation for services, contract or otherwise; isn't that right?

A. As far as I know.

Q. Well, let me put it to you this way: as a certified public accountant of some 25 years' standing or more, and the senior partner of this firm, do you have any doubt in your mind as you sit there on the stand that we are talking about dividends?

A. All I can say is that they appear to be dividends; I am not sure. They could be dividends belonging to someone else that are not part of his income. They could also be checks from the company for a redemption or anything else, we wouldn't know. Because of the activity, because they occur several times they would be an indication that they would be dividend checks.

Q. Substantially everyone of these items we are talking about are the Doctor's old friends as far as stockholdings go: Case, Motorola, RCA, Stewart-Warner—the same stocks that were appearing year after year; isn't that right?

A. Yes.

Q. Well, I take it, then, that you are satisfied that they would appear to be dividends, is that right?

A. Yes.

* * * * *

Q. Are you now satisfied, Mr. Sanfilippo, that when it comes to the items we were reviewing, the \$1400 Motorola item; the \$70 Eversharp item; the \$25 Deere item; the \$50 Ainsworth item; the \$37.50 Ainsworth item; the Minneapolis-Moline item of \$40, and the RCA item of \$550, that they were not anywhere reflected in these worksheets?

A. If they are all the items that we checked before [fol. 143] through these statements, broker's statements, I would say that you are right.

* * * * *

Q. Now you told us before the recess, as I recall it, that these items in the Newburger, Loeb account appeared or appear to be dividends; do you remember that?

A. Yes.

Mr. Newcomb: I believe, may it please the Court, that all of the checks are in evidence offered by the Government.

Q. Now if the items we have reviewed—pardon me. According to my calculation the items in question amount to \$2210, and I put to you this question: If those, in fact, were dividends, am I not correct that the additional amount of \$2210 omitted from the 1952 return of the Doctor was due to the clerical or the accounting errors and omissions of your firm?

A. Not necessarily.

Q. Did you make any effort, Mr. Sanfilippo, to actually establish that they were not dividends?

A. I don't remember.

Q. You don't know, isn't that right?

A. I wouldn't say I don't know. I don't remember whether we checked it through or made any inquiries on it.

Q. Who did this work?

A. It was done by members of the staff under our supervision, and with respect to those—

Q. Did you check these worksheets?

A. Yes.

Q. These worksheets?

A. We reviewed or surveyed—

Q. You personally?

A. I reviewed or surveyed these worksheets without going into details, yes.

Q. You didn't look into any of these accounts?

A. I didn't check back everything that is contained in these schedules, no.

[fol. 144] Q. My question, sir, shortening it somewhat, is, will you not concede that on the basis of what you have been shown here today in this courtroom your firm was at least required to make inquiry as to these items in order to prepare a complete, accurate and proper return?

A. No.

Q. Mr. Sanfilippo, Government's Exhibit 6—you are quite familiar with it, are you not?

A. Yes.

Q. And you are quite familiar with its importance in this case?

A. Yes.

Q. This sheet contains some \$16,000 in dividends listed for the year 1951. You know that total is approximately correct, isn't that right?

A. I don't remember the item but—

Q. It is a large amount?

A. Yes.

Q. And in the return prepared by you, your firm for that year, dividends on personally-held stocks were reported in the amount of \$3800. That figure you are familiar with?

A. Not particularly. I don't remember the amounts for each year.

Q. Well, all I want to know at this juncture is this: Are you aware of the fact that if you received this Steiner-Rouse sheet prior to the preparation of the 1951 return, then your firm omitted between \$10,000 and \$12,000 of dividends from the 1951 return which had been reported to you by the Doctor; are you aware of that fact?

A. I was not aware of it until you just pointed it out now.

Q. That is the first time, sir, that it has ever occurred to you?

A. Yes.

Q. That is the first time that you have ever thought that it was important to you personally to prove that you did not get it until early in 1953 when you were preparing the 1952 return?

A. That is right.

[fol. 145] Q. Do you recall that upon this trial you testified that you did not receive this list until after the Mishler investigation began?

A. That is right.

Q. And do you recall that you testified here that you did not receive this list until Mr. Mishler had asked you for additional information, and you, in turn, had asked the Doctor, and then you say or said he produced this Exhibit 6?

A. That is right.

Q. Were you examined under oath by the special agents in this case?

A. Yes.

Q. Do you recall when I was examining you, I think, yesterday you said you had a conversation with Mr. Amoruso about Government's Exhibit 6.

Do you remember that?

A. I don't recall that.

Q. Well, did you have a conversation with Mr. Amoruso about Exhibit 6 shortly after you received Exhibit 6 from the Doctor?

A. I don't recall that.

* * * * *

Mr. Newcomb: Page 517, your Honor.

By Mr. Newcomb:

Q. I would like to read you the testimony, Mr. Sanfilippo:

* * * * *

Now I am going to try to refresh your recollection or try to ask you again, did you have a conversation with Mr. Amoruso shortly after you first received Exhibit 6?

A. I had a conversation with him with respect to that item. As to the time, I cannot fix it definitely whether it was shortly or just what the meaning of shortly is, whether it is a day or a week, I cannot say.

Q. Let us say a month?

A. I definitely would say yes, within a period of a month.

Q. What was the conversation?

A. I don't remember the conversation, except that it was [fol. 146] with respect to checking the items of dividends as reported on the tax return for 1951 against the figures as related to Mr. Mishler, the agent. In other words, there was apparent discrepancy and that was submitted as an amended report or a corrected copy of the dividends for the year 1951.

Q. And the latter part of your answer refers to something that you gave to Mr. Mishler, is that right?

A. No, it refers to this particular statement which was the basis for the paper that was given to Mr. Mishler.

Q. You say this was submitted to you by the Doctor, is that right, sir?

A. Yes.

Q. As what?

A. As an amended copy of the dividends for the year 1951.

Q. And what did you say to the doctor about it?

A. I suggested that he file an amended return, and we discussed it, and he agreed to it, and he did make what was equivalent to an amended return. He made out a sheet of paper setting forth corrected figures for three years and we submitted that to Mr. Mishler.

Q. Did you ask the Doctor when he had prepared it?

A. I don't remember.

Q. Well, you had certified the return of this Doctor with an understatement of \$12,000, ten or twelve thousand dollars, did you not ask the Doctor then when he had prepared it?

A. I don't remember whether I did or not and just what was discussed.

Q. Did you say to him, in words or substance, "Doc, how could you do this to me?"

A. I don't remember the exact words. I do remember that we noticed there was a discrepancy, and in view of the fact that there was a substantial discrepancy I suggested and he agreed to file an amended return.

Q. You noticed that there was a substantial discrepancy?

A. Yes.

Q. A very, very serious one?

A. That's right.

Q. Is that right?

A. Yes.

[fol. 147] Q. You understood that at the time?

A. We understood there was a discrepancy. As to how much it was, I don't know.

Q. You had this conversation with Mr. Amoruso before you prepared the 1952 return, did you not?

A. I think so.

Q. And you had the conversation you described with the Doctor before you prepared the 1952 return?

A. Yes.

Q. Did you look at the paper with some interest to try to see for yourself when it had been prepared?

A. It never occurred to me at that time that that was important. I don't remember going into that particular angle of it.

Q. Did you make any memorandum about it at the time?

A. We made memorandums and prepared new schedules.

Q. Where an accountant has certified a return and your client turns up with a new record showing that ten or twelve thousand dollars had been omitted, would it not be normal for the accountant to make a memorandum or a note to establish the fact that that was the first time he had ever seen it?

A. I don't know what the usual practice is. I haven't had any similar instances before that—

Q. Mr. Sanfilippo, did you make any note, memorandum or record of any kind as to when you got this piece of paper?

A. Not that I remember.

Q. Did you discuss this piece of paper with Mr. Mishler at any time during, let us say, the first two years of the investigation?

A. We did discuss the figures; we did not discuss that statement or that paper particularly, as far as I remember.

Q. You discussed figures with Mr. Mishler?

A. That's right.

Q. You did not tell Mr. Mishler that you had received this paper early in 1953 after the investigation began, did you?

A. I don't remember just what I told him; whether I showed him that paper at all. We just used it as the basis [fol. 148] of filing an amended return covering those three years in question.

Mr. McHugh: May the record show that the last few questions and answers referred to the Steiner, Rouse form, Exhibit 6, when you said "this piece of paper"?

Mr. Newcomb: I am sure it is clear, but I am going to state that for the record.

Q. Did there come a time when you were examined under oath by the special agents?

A. Yes.

Q. You have previously identified Defendant's Exhibit

Y-7 for identification as your testimony given on July 16, 1956, which would be roughly 16 or 17 months ago. Do you remember testifying?

A. Yes.

Q. Do you remember that it was—well, I will tell you it was on July 6, 1956, and that will be—

Mr. McHugh—July 16th.

Q. (Continuing) July 16, 1956, and that would be something over three years after the time which you now say you received this Steiner, Rouse paper. Mr. Sanfilippo, I ask you whether your memory of it then was better than your memory of it when you testified here some 16 or 18 months later and some approximately four and a half or five years after you say you received this paper?

A. I feel my recollection of the circumstances is better today because we reviewed that several times.

Q. When you testified before the special agents under oath, I ask you whether you were asked the following questions and gave the following answers, on page 32:

“Q. On the margin account, in order to arrive at the capital gain or loss”—

I am going to ask you about some of the off-the-record discussion, but I will deal with this question first.

[fol. 149] “Q. On the margin account in order to arrive at the capital gain or loss did you use the ‘first in-first out’ method in arriving at the gains or losses?

A. We attempted to do that by questioning him.”

Then the transcript shows an off-the-record discussion. Do you remember the off-the-record discussion about the “first in-first out” method?

A. Not particularly. I remember that it was more or less in connection with describing what he meant, what the agent meant, and he tried to explain it to me and refresh my recollection about it.

Q. And then your answer goes on:

“In connection with the ‘first in-first out’ information we would gather that information from him personally because although the margin account—the brokerage statements may have contained similar stocks, they may not necessarily have the various purchases. Other than that we had no

accurate tying in of the purchase transactions with the sale transactions. The statements were incomplete."

Then the transcript shows another off-the-record discussion, and do you remember this off-the-record discussion also about the "first in-first out"?

A. No.

Q. Then you were asked the following question:

"Q. There is among the work papers for the year 1952 a form printed by Steiner, Rouse & Company, which is a schedule of dividends and interest, which shows dates and initials of stock and amounts for the years 1951 and 1952, and there is also attached adding machine tapes for these two years. Tell me whether that was part of your work papers or not."

The record shows, "Form submitted to witness.

A. I have no recollection other than the notations at the top of each of the tapes appear to be my handwriting."

Now you were talking about Exhibit 6, is that right?

A. I believe so.

[fol. 150] Q. And that was the paper that was shown to you at that time?

A. Yes.

Q. Is that correct?

A. Yes.

Q. And then you said—and then the next question was:

"Q. Do you know whose writing that schedule is?

A. I believe submitted to us by Dr. Palermo.

"Q. When did he submit that schedule?

A. I do not know."

Did you give that testimony?

A. To that point, yes.

Q. Did you know at that time when he had given it to you?

A. I knew approximately about the same time—

Mr. Newcomb: Your Honor, my question was clear.

The Court: Yes.

Q. Did you know at the time you gave this testimony when the Doctor had given you Exhibit 6?

A. At that particular moment that you read, I did not remember.

Q. "Q. Would you know whether it was before the commencement of the investigation by the Internal Revenue or after?

A. I have no recollection."

Did you give that testimony?

A. Yes.

Q. Was it truthful at the time you gave it?

A. Yes.

Q. "Q. The taxpayer reported dividends in 1951 of \$13,575 and that tape indicates the total of \$16,269. Could you explain that?

A. I cannot account for this."

Did you give that testimony and was it truthful?

A. Yes.

Q. "Q. You do not know when you first saw this schedule?

A. No, I don't."

Did you give that testimony under oath?

A. Yes.

Q. Mr. Sanfilippo, when they showed you that schedule or the exhibit on July 16, 1956, it made a very vivid impression on you, did it not?

A. I wouldn't say it made any more impression than any other document that I saw that I couldn't identify.

[fol. 151] Q. To whom, shortly after July 16th, did you talk about that, the questions that had been put to you about this Exhibit 6?

A. I don't remember.

Q. Sir?

A. I don't remember.

Q. Did you talk to the Doctor about it?

A. I don't remember at what time I talked with him; I talked to him several times.

Q. Did you talk to him about Exhibit 6?

A. At some time or other I did talk to him about it.

Q. Some time prior to this trial?

A. I don't remember talking to him at any particular time; I do remember talking to him—

Q. Some time prior to when this trial began?

A. Some time subsequent to the examination by Mr. Mishler and before the trial, yes, sir.

Q. Now let us go back further. You testified before the grand jury in March. Did you talk with the Doctor about this Exhibit 6 after you testified in the grand jury?

A. Not that I remember.

Q. So we have narrowed it down, that you talked to the Doctor about Exhibit 6, the one to which you are referring, after July 16, 1956, and before March, 1957, is that right?

A. If that was the time of the grand jury examination, then that is right.

Q. Let us work a little further back. Do you remember the time, that there came a time, which we can fix by other evidence, when Higgins, Brenner & Higgins was supplanted as counsel in this case by the firm of Dwight, Royall, Harris, Koegel & Caskey—never mind when that was—do you remember that that occurred?

A. Yes.

Q. And did you talk to the Doctor about Exhibit 6 before or after Dwight, Royall came into the case?

A. I believe it was before.

Q. Now I believe that Dwight, Royall came into the case September, 1955. That is too far back, is it not, because we are talking about a conversation that you had with the [fol: 152] Doctor about Exhibit 6 after you had been questioned about it under oath on July 16, 1956. Let us go back again.

A. I don't remember any such—

Q. Are you saying that you didn't talk to the Doctor about Exhibit 6 after you were examined by the agents?

A. I don't remember talking to him at any particular time; I do remember talking to him. That's all I can say. As to the time, I don't remember when it was.

Q. Do you remember asking the Doctor, please, for your sake, to tell a certain story about this exhibit?

A. I never remember anything of the kind.

Q. Did you ask the Doctor to please say about this exhibit that you hadn't got it until 1953?

A. I have no such information.

Q. After you were examined by the agent or the agents on July 16th did you go and talk to Mr. Amoruso at that time?

A. We discussed the entire case throughout the examination, yes.

Q. You and Mr. Amoruso?

A. Yes.

Q. And Mr. Barranco was there part of the time when this was being talked about?

A. Not that I remember.

Q. Steiner, Rouse?

A. Not that I remember.

Q. Now then, what was the conversation between you and Mr. Amoruso about Steiner-Rouse, Government's Exhibit 6, occurring after you had been examined?

A. We discussed the entire case, things that were said. I don't remember anything particular about Steiner-Rouse except to try to identify it because it was not clear in my mind as to just what it was and when it was submitted.

Q. What was not clear in your mind, sir?

A. As to what that thing represented, what that schedule was for, what it consisted of. In other words, we discussed the particular question in connection with my statements before the agents to try to get it clear in my mind.

Q. The big question that was bothering you and Mr. Amoruso was "When did we get this?" Isn't that what [fol. 153] you talked about?

A. We may have discussed when we got it. Principally it was what it had to do—in other words, what it had to do with the reports, with the returns.

Q. Did you discuss—never mind what you may have done—did you and Mr. Amoruso discuss this question of when you got the Steiner-Rouse card, and did you discuss it shortly after you testified before the special agents?

A. We discussed that whole question of the testimony given before the agents. With respect to this item I don't remember anything more than having discussed the paper with him. As to the details, I don't remember what they were.

Q. Well, did you in the course of that discussion have a recollection come back to you that you had not received it until 1953?

A. Yes.

Q. And you then got or formed a recollection or acquired a recollection—pardon me, I didn't mean any sarcasm in the word "acquired" and I withdraw the question. It came back to you then, I gather, that you had not received it until January 1953, until early in 1953, is that right?

A. Yes.

Q. And didn't Mr. Amoruso refresh your recollection?

A. As a result of the conversation I believe he did.

Q. And did Mr. Amoruso point out to you that the figures in Exhibit 6 had been incorporated into the 1952 return so that you could not say you got it after March 1953; did he point that out?

A. I don't remember any such conversation.

Q. Was it discussed between you that you could not afford to admit that you got it prior to March 1952, for the reason that in the worksheets in Mr. Amoruso's handwriting there was the figure \$3800 entered for these dividends in connection with the 1951 return?

A. That had no bearing on it.

[fol. 154] Q. Was it discussed?

A. I don't remember specifically discussing that question.

Q. Did you go over returns or worksheets or look at that papers of any kind or nature?

A. At various times we looked at papers and discussed—

Q. I am talking about the time when you and Mr. Amoruso met and you say something happened that refreshed your recollection. I am trying, frankly, to find out what you will testify to as to what refreshed your recollection.

A. It was a question even at the time of the statement, the statement that was made before the agent, the conversation with Mr. Amoruso refreshed my memory to the extent that that thing had been received in the early part of 1953.

Q. When it was refreshed, as you have described, in your conversation, did it then become the clear, straightforward recollection to which you testified here, namely, that you positively did not get it prior to early 1953?

A. Yes.

Q. And from that time on, I judge that you have had a clear recollection at all times that you received this in early 1953 and not before?

A. Yes.

Q. Then the question of Steiner, Rouse came up with the agents again, did it not?

A. I don't understand that question.

Q. Well, your testimony was given on July 16, and you remember I showed it to you, and you said you read it over and made corrections; then you signed it, and it was notarized and sworn to on August 23, 1956. Now do you remember going back to their office and signing and swearing to this transcript?

A. I remember going back to sign the paper. The information that is contained on that paper I believe was arrived at about the same time as I gave the original testimony.

[fol. 155] Q. That paper, I take it, you are talking about is that affidavit you know you signed?

A. That is right.

Q. Which I do not happen to have in my hand but I will get there. Mr. Sanfilippo, when you went back on the 23rd of August was Special Agent Harper there?

A. I believe he was.

Q. Did you tell Mr. Harper on the 23rd of August that your recollection had been refreshed and that you now had a clear, straightforward recollection that you never got Steiner, Rouse until 1953?

A. I don't believe that is a good explanation of what took place.

Q. I didn't ask you whether it was an explanation; I asked you whether you told him that.

A. No.

Q. Did you?

A. No.

Mr. Newcomb: May I have the affidavit?

(Affidavit handed to Mr. Newcomb.)

By Mr. Newcomb:

*Q. Did you on the 23rd of August, 1956, under oath give an affidavit reading as follows:

"I, Arthur R. Sanfilippo, residing at 3001 Arlington Avenue, Bronx, N. Y., having been duly sworn, depose and say:

"I appeared at the office of the Intelligence Division, Internal Revenue Service, on July 16, 1956, and

was interviewed under oath by Special Agent Eugene W. Harper in connection with the income tax liability of Dr. Anthony M. Palermo.

"I wish to clarify a portion of that statement appearing on pages 32 and 33 with reference to a form printed [fol. 156] by Steiner, Rouse & Company entitled 'Schedule of Dividends and Interest' which was among my work papers and which shows a schedule of dividends of Dr. Palermo for the years 1951 and 1952. Attached to this form were adding machine tapes totaling \$16,269.78 in 1951 and \$21,565.18 in 1952. I stated on July 16, 1956, that the handwriting on these papers was mine; I had no recollection of seeing it before; and therefore I could not say when I first saw this form.

"I wish now to comment further on this schedule of dividends. I believe that at the time I qualified my answers in an 'off-the-record discussion' as shown on page 32. I wish at this time to qualify and clarify my answers. It appears from examination of the Steiner, Rouse form and photostatic copies of Dr. Palermo's tax returns for 1951 and 1952 that I received this form with the notations of dividends from Dr. Palermo after Revenue Agent Mishler had commenced his examination of Dr. Palermo's returns. I recall that Mr. Mishler requested additional information concerning the Doctor's dividend income and I believe that Dr. Palermo supplied me with this form with the notations of dividends at that time."

Now, did you swear to that affidavit?

A. Yes.

Q. And was it true?

A. Yes.

[fol. 157]

New York, December 12, 1957;
10:30 o'clock A. M.

REQUEST TO PRODUCE MEMORANDUM AND DENIAL THEREOF

Mr. Newcomb: Good morning, your Honor.

Your Honor, I am afraid that we have our old friend, the Jencks case, back with us.

I now ask the Government to produce for my examination, for use in cross-examination of Mr. Sanfilippo, any memoranda of Agent Harper and, I believe, Revenue Agent Schreiber, as to their conversations with Mr. Sanfilippo on August 23, 1956, at the time he signed the affidavit that was referred to in his testimony yesterday.

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Mr. Newcomb: Indeed, now I see on your Honor's question that I did not. What we ask for is any memorandum of the agents reflecting or recording what Mr. Sanfilippo said to them, and only that, not anything else that may be in the memorandum, but if their memorandum, if there is a memorandum, contains either a quote or a summarization or epitome of what he said to them, it is that part, and that limited part only, that we are asking for.

We recognize that we are not entitled to anything else. It is that very limited request that is being made.

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Mr. McHugh: It is our position that the memorandum of the conference which was made by Agent Harper—and there was one made on or about August 23, 1956, when Mr. [fol. 158] Sanfilippo came in and signed that affidavit which Mr. Newcomb has in his possession and which was turned over by the Government—there is such a memorandum made, but it is clearly not within the Jencks, so-called statute, Section 3500.

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I think that Mr. Newcomb has virtually conceded that in his limited demand, as I understand it, asking only for quotes. There are no quotes in that memorandum, and, if the Court wishes, I will hand the memorandum to the Court to show you that it is merely a hearsay report of Harper of the conference had with Mr. Sanfilippo on or about August 23rd.

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The Court: Mr. Newcomb, how do you hope to bring yourself within subdivision (e) of Section 3500?

Mr. Newcomb: I do not hope to bring myself within it; I do not think I belong within it.

.

The Court: All right.

Mr. Newcomb: I think I belong within the Jencks case, and I do not read Section 3500 as applying to anything except what is specifically stated therein.

As I see it, analytically, Jencks, let us say, covered a field this big (indicating). The statute, dealing with a very limited portion thereof, set up certain definitions and procedures, but the statute did not say—it did not repeal Jencks in any areas not specifically covered by the statute.

* * * * *

The Court: Mr. Newcomb, I should say that Section 3500 enumerated all of the cases where a statement could be used to impeach a witness. The definition of "statement" there I think covers everything where the paper could be used to [fol. 159] confront the witness and put in evidence as a contradiction of what he was saying. Anything else would be mere hearsay against him and could not be put in evidence. It might be useful for a cross-examiner to ask if he had not made these statements and then perhaps be bound by the witness' answer, but it never could be put in evidence. Now, I do not understand that the Jencks case deals with anything except impeaching material, material which could be put in evidence against the statement of the witness on the stand.

What is your view on that?

Mr. Newcomb: In the first place, your Honor, I would like to deal with this question of impeachment and evidence, and as I am sure they all know, I have the highest respect for the special agents and for these gentlemen in particular.

Let us assume that what happened was that when he came back on the 23rd they asked him again about this Steiner, Rouse, and he again said that he did not remember it. And then suppose they showed him the 1951 tax returns—

Do you have that affidavit?

(Affidavit handed to Mr. Newcomb.)

Mr. Newcomb: (Continuing) —and the 1952 returns and pointed out to him that the data for 1952 were reported in the return so the accountants must have had the document before that return was made up; and then pointed out to them, to Mr. Sanfilippo, that the data was not reported in

the 1951 return, and they pointed out the gross differences between them, which would be relatively very large, and pointed out to them, to Mr. Sanfilippo, that if he had that Steiner, Rouse thing in his office, or if his firm did, then they had certified a return under circumstances which were very black-looking from their standpoint.

[fol. 160] Bear in mind also that while it is not in this case, certain consideration must have been given by the Government to the question of conspiracy, and Mr. Sanfilippo, indeed, was warned by Mr. Harper of his constitutional rights and right to refuse to answer.

And suppose—I am not just being fantastic, I think, as your Honor can see—suppose there is a memorandum of the agent indicating that when Mr. Sanfilippo arrived there on the 21st he first said that he still could not remember this thing. Now—

The Court: So far that is hearsay.

Mr. Newcomb: But I could call—I could use that to cross-examine Mr. Sanfilippo—

The Court: It might be valuable if you had it.

Mr. Newcomb: Extremely valuable. And then on my case I could call the agent to testify to it, and it is not mere impeachment. I could call the agent to testify to a contradictory statement so that my first thing that I would like to say is that I do not think that the principle of the Jencks case depends upon the narrow concepts of impeachment for cross-examination. I do not think it should and I do not think it does.

Now, I realize that the Court has given earnest consideration to this whole problem, and I do not want to argue it at length; but I would like to make my record, and I will do it very briefly. Perhaps it will be helpful to the Court as well for me to outline briefly the importance of this situation.

The Steiner, Rouse part is all in the Doctor's handwriting. You can tell by looking at it that it is some sort of a contemporaneous record of the dividends received by him as they were received.

For 1951 it shows roughly \$16,200 in dividends on personally-held stocks. In the tax return for that year per-
[fol. 161] sonally-held stocks are only reported to the extent

of \$3,800. In the work papers the figures of "3800" is there in handwriting of Mr. Amoruso.

If Mr. Sanfilippo's firm had this in its possession prior to March, 1952, then obviously that would have great bearing and would go far to establish the complete innocence of the defendant. He would at the same time establish, at least gross negligence on the part of the accountants.

Now, the Government called this witness and adduced from him on direct examination testimony—positive, clear, unequivocal testimony that they did not receive this until February or March or thereabouts, 1953.

We have shown already that Mr. Sanfilippo was questioned about that under oath by the agents on July 16, 1956.

He then said, "I don't remember that; I don't know when we got it; I can't explain it."

And they asked him specifically:

"Did you get it before or after Mr. Mishler began this investigation?"

He said: "I don't know."

And then they asked him:

"And you have no knowledge of when you got it?"

And he said: "No," under oath.

With his statement on direct we are thus faced with a situation where he has testified on a vital issue in the case one way to incriminate the defendant upon this trial, and he is flatly contradicted by his testimony under oath given to the agents on July 16, 1956.

Then on cross-examination I have elicited from him testimony that after he was examined on July 16th he talked to his partner, Mr. Amoruso, and in that conversation he says [fol. 162] that he derived a refreshed recollection, clear, to the effect that he never received this until 1953, which recollection he has said under oath never left him at any time thereafter.

We then come to the affidavit.

He went to the agents to sign his testimony on August 23, 1956.

He said in his affidavit not that he had a recollection or a clear recollection; that he had forgotten it when he testified,

but now he remembers. He said: "It appears from examination of the Steiner, Rouse form and photostatic copies of Dr. Palermo's tax returns for 1951 and 1952 that I received this form with notations of dividends from Dr. Palermo after Revenue Agent Mishler had commenced his examination of Dr. Palermo's returns. I recall that Mr. Mishler requested additional information concerning the Doctor's dividend income, and I believe that Dr. Palermo supplied me with this form with the notation of dividends at that time.

Thus, may it please the Court, what happened on the 23rd of August in connection with this affidavit is obviously of transcendent importance if justice is to be done in this case, whichever way it goes.

As I read the Jencks case or any other case, at common law I could call Mr. Harper on my case and call him blind. But that burden is not one that I think should be imposed upon the defendant in a situation as serious as this, where the witness on vital points had made this kind of contradictory statements under oath.

I believe that at this stage—and I am trying to be extremely careful to limit myself to what I believe to be a proper interpretation of the case—at this point I believe that I am entitled under the Jencks case to any memorandum [fol. 163] of a Government agent made at or about that time in which directly, by summarization, paraphrasing or otherwise he sets forth the substance of anything that was said by Mr. Sanfilippo, the Government witness at that time; and I do not believe that I am limited to a stenographic transcript, a mechanical recording. People's communications are recorded in many ways, and this is one of them. And if Section 3500 under those circumstances does attempt to say to us in this case that we cannot have such a limited relief, then I will say, and I want to preserve the point, that I sincerely believe that Congress has gone farther than it may properly do, and I believe that there you would have a due process question of substance, and we would, therefore, and do, therefore, say that if that is the interpretation of the statute, and if that is what Congress tried to do, the statute is to that extent unconstitutional.

We do not, however, most respectfully, agree that the statute has preempted the field. We do not think that it goes any farther than to deal with the express things stated therein, and was not intended to exclude other items not referred to in the statute.

The Court: Do you think that you have greater rights with respect to informal writings of witnesses' statements than you have with respect to stenographic transcripts?

Mr. Newcomb: Well, your Honor has asked me to endorse the fundamental constitutionality of the statute as it applies to mechanical devices. That I frankly have not given any consideration to at the moment up to now, because I didn't think it was involved, but—

The Court: That is what you are saying, that this is not subject to the limitations stated in the statute.

[fol. 164] Mr. McHugh: May it please your Honor, I think Mr. Newcomb has, in his usually eloquent way, made a very moving appeal for the production of this document, and I say that in all sincerity, not in a sense of flattery, because your Honor has said before that such an appeal had moved him to change his mind.

But I say that Mr. Newcomb is attempting to substitute a test of utility for his purposes. The test that is set forth in the statute and the Jencks decision, basically, I submit, is one of impeaching the credibility of the witness. Your Honor mentioned that point at the outset and I won't labor it, but it is clear that this document that we are talking about, namely, an agent's memorandum of the conference, is certainly within the contemplation of the statute, and I submit that it was within the contemplation of those who drafted the statute, as our memorandum of law which was previously submitted to your Honor states.

When the men in Congress considered this they said, We are not going to require the Government to produce to defense counsel for the purpose of impeaching a witness, any of their notes or any of their memoranda or memorandum reports about conversations or conferences that they had with witnesses, because once you get into that field you are really going into the field of subjective impressions, in large part, of the agent who makes the report and not merely what the witness said.

And Congress has said that if there is a substantially verbatim account, or a signed statement of the witness, or one that has been shown to him and adopted by him at some later date, then you turn that over, because that is the fair thing to do. He has had a chance to look at it and he knows very well then whether it fairly and accurately records what he has said.

But here we are faced with something entirely different: a document that is merely the impression or recollection of Agent Harper of what this witness may have said to him at one time or another, and it certainly is a document that is covered by the statute and is one that is outside of the mandate of the statute.

[fol: 165] Mr. Newcomb: That is our position.

The Court: And yet it is not such a damaging document as something signed by the witness would be.

Mr. Newcomb: Well, in my experience in this field of human activity they say a great many things to agents, policemen, detectives, assistant district attorneys and the like, that they would never say in a recorded statement.

The Court: One reason is that they can always deny it.

* * * * *

The Court: I think that the Jencks decision is limited to impeaching and I deny the request for a direction that the Government produce the reports.

Mr. Newcomb: I understand under the rules that I do not need to take an exception.

The Court: I like the sound of it, though.

Mr. Newcomb: All right, sir. We do except, your Honor.

Mr. McHugh: If your Honor please, before the jury comes back, I would like to suggest that it might be advisable to mark a copy of this statement in the event that there should be a review of this decision some day and so that it might be before the Appellate Court.

The Court: Yes. Do you prefer to have it marked as a Court's exhibit for identification?

Mr. McHugh: As a Court exhibit, yes, sir.

* * * * *

Now I hand to the clerk a copy of the memorandum of the conference made by Agent Harper.

(Marked Court's Exhibit 2 for identification.)

[fol. 166] ARTHUR R. SANFILIPPO, resumed.

Cross examination (Continued).

By Mr. Newcomb:

Q. Now these three worksheets were set up, were they not, to deal with the defendant's capital gains or losses for the year 1952?

A. I think so.

Q. Now let us look at the Newburger, Loeb, one, the margin account, which is Exhibit V-7-C.

Do you have that before you?

A. Yes.

Q. Now there the worksheet was set up for an analysis of that account, is that right?

A. Yes.

Q. The worksheet was designed to have them set up all the purchases and then record any sales made during the year, is that right?

A. Yes.

Q. And that one covered the Newburger, Loeb margin account.

Now then we come to the next one, which is the Fox, O'Hara margin account, V-7-B; and there the clerk goes through that account and sets up all stocks acquired during the year in that account; correct?

A. Yes.

Q. And the cost thereof, is that right?

A. Yes.

Q. After setting up the two worksheets on the two margin accounts you would have an inventory of the defendant's

stock purchased during the year 1952 in those accounts, is that right?

A. Yes.

Q. Mr. Sanfilippo, this work would not give you—and by “this work” I mean the work that was done in setting up these two 14-column sheets, Exhibits V-7-B and V-7-C—would not give you any information as to stocks acquired by the defendant during 1952 which were not handled through the margin account, is that right?

A. Yes.

[fol. 167] Q. You were aware of the fact that the defendant had substantial loans at the National City Bank secured by common stocks, is that right?

A. Yes.

Q. You were also aware of the fact that he had some vault stocks, is that right?

A. I don't know whether I was aware of it at this particular time, at the time that this work was done.

Q. Do you remember Exhibit V-6? Where do you suppose those dividends came from?

A. It could have come from the bank held as security for the loan.

Q. Where at the time you got V-6 did you suppose they came from if you thought about it at all?

A. I have no recollection as to my thoughts at that time.

Q. Going back, you knew he had a large loan secured by stocks; that you have stated?

A. Yes.

Q. Did you also know he had substantial amounts of what we call vault stocks or outright stocks that were not pledged anywhere?

A. I don't remember whether I knew that at the time or not.

Q. Limiting ourselves to what you did know, what effort did you make in 1952 to ascertain the defendant's capital gains, if any, on stocks not reflected in his two margin accounts referred to in Exhibits V-7-B and V-7-C?

A. Our efforts were in the direction that we asked him to give us any and all papers that would be necessary to get that data.

Q. Did you ask him for a transcript of his cash accounts?

A. I don't remember asking him that particular question.

Q. Now will you look at Exhibit V-7-A. Now do you see it is entitled "A. M. Palermo Fox, O'Hara Stock Transactions"; and then it has up in the left-hand side "Cash" and it looks to me like "ANS" which I would suppose means analysis.

Do you see that?

A. Yes.

[fol. 168] Q. And when you observed that, it sets up an inventory of stocks as of January 1, 1952.

Do you see that?

A. Yes.

Q. In order to prepare a proper tax return for 1952 you would be required to have, would you not, an inventory of stock that the defendant held at the beginning of the year; isn't that right?

A. That would be helpful, yes.

Q. And it would appear that someone in your organization started off that way, started to do that job, would it not?

A. Yes.

Q. And it would appear clear from Exhibit V-7-A, would it not, that the effort was abandoned?

A. I cannot come to that conclusion, not knowing whether any transactions took place with respect to those stocks.

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Q. Mr. Sanfilippo, you knew, did you not, that the defendant had a substantial cash account at Newburger, Loeb during 1952 and a substantial cash account at Fox, O'Hara during 1952?

A. I knew we had those accounts. To what extent I don't remember.

Q. Would you look at your work papers, the entire folder, if you wish, and tell us whether despite the fact that you knew he had those accounts, your firm recorded a single transaction for 1952 in the Newburger, Loeb cash account or the Fox, O'Hara cash account?

A. I don't see any other information indicative of information with respect to stock transactions.

Q. I ask you now again whether you reviewed or examined the work of your clerks in connection with the Doctor's 1952 return?

A. I did.

Q. And do you say to me that you examined V-7-A and passed it—well, that's two questions, so let me split them up.

[fol. 169] Do you have a recollection as you sit there of examining V-7-A in connection with the Doctor's 1952 return?

A. No.

Q. I take it, then, you did not examine it, is that right?

A. No, that is not right. I don't recollect at this point seeing this.

Q. Are you, a certified public accountant—

A. Yes.

Q. Are you, a certified public accountant, telling this jury that it is possible that you examined V-7-A and passed it in its present form?

A. Yes.

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Q. Were you, in fact, supplied, directly or indirectly, by the Doctor with a blank check which was filled out in your office for the tax year 1952?

A. I don't remember.

Q. Were you, directly or indirectly, supplied by the Doctor with a blank check for the tax year 1950, which was filled out in your office?

A. I don't remember.

Q. Was it not the Doctor's practice in substantially every year covering the period for the tax years 1948 to 1952 to supply your firm with a blank check for his taxes which was filled out in your office?

A. No.

Q. Do you remember testifying in answer to my questions on cross-examination at some length on the subject of going over the Doctor's returns, the figures in the Doctor's returns with him, item by item, before he went south each year; do you remember that?

A. Yes.

Q. When you testified before the special agents on July 16, 1956, I ask you if you were asked the following questions under oath and gave the following answers: This is on page 10, towards the bottom of the page.

"Q. After the income tax returns had been prepared, would you explain the various items in the return to the taxpayer?"

A. Whenever we personally gave it to him we may have [fol. 170] answered some questions. I cannot remember offhand."

Did you give that testimony?

A. Yes.

Q. Was it truthful then?

A. Yes.

Q. When at any time during the tax years 1948 to 1952 did "we personally" give the defendant's tax returns to him?

A. Repeat that question, please.

(Question read.)

A. I don't understand the question.

Q. You testified in July, 1956, when you were asked whether you went over the returns with him and you gave this answer, which I will read to you again:

"Whenever we personally gave it to him we may answered some questions. I cannot remember offhand."

As I read that, it says, among other things, that you personally gave his tax returns to the defendant at some time. Now did you?

A. It says "whenever," which means it could have been one year or—

Q. Did you give the defendant's tax returns to him personally at any time in connection with the years 1948 to 1952?

A. Yes.

Q. When?

A. I don't remember what year.

Q. Was it 1952?

A. I don't remember. I cannot answer as to any specific year.

Q. And you have no knowledge as to 1951?

A. No.

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Q. Is that right?

A. That's right.

Q. You cannot remember as to 1950?

A. That's right.

Q. And you cannot remember as to 1949 or 1948, is that right?

A. That's right.

Q. But you are absolutely positive, are you, that in at least one of those five years you personally gave the final return to the defendant, are you?

A. I don't remember handing him the return in any one of those particular years, or whether it was mailed to him, or it may also have been mailed to the Tax Department [fol. 171] directly, but it was one of those three things.

Q. The next question on page 10:

"Q. What was the procedure after you prepared the return?"

A. To mail the return to him for signature with instructions to make payment."

Did you give that testimony under oath?

A. Yes.

Q. During the tax years 1948 to 1952 inclusive did any such thing ever happen?

A. Yes.

Q. Sir?

A. Yes.

Q. To your own personal knowledge?

A. Yes.

Q. So that there may be no misunderstanding, I take it then that you are testifying under oath as to your personal knowledge that in one or more of those tax years the Doctor's return in final form was mailed to him for signature with instructions to make payment, is that right?

A. Yes.

Q. And that is of your own knowledge?

A. Yes.

Q. The question on top of page 11:

"Q. Had this return already been signed by a member of your firm?"

A. Before being mailed out, it would be, yes.

"Q. He would file the return himself after he signed it?

A. That is right."

Now did that ever happen in any one of those years from 1948 to 1952, namely, that the Doctor filed the return himself?

A. I have no way of knowing what he did himself. I do know that we sent the returns to him at times for mailing to the proper authorities.

Q. During those years.

A. During those years. Whether he mailed it himself—

Q. You personally know it?

A. I don't personally know that he mailed it himself or he had somebody else mail it.

* * * * *

Q. Mr. Sanfilippo, do you have before you Exhibit T-7-B, being the worksheet for 1950 entitled "Stock Transactions, Fox, O'Hara?"

A. Yes.

[fol. 172] Q. And do you observe a total listing of stocks or a column of figures resulting in the figure \$10,625.52?

A. Yes.

Q. Then over on the righthand side, to the right of that do you see the notation "Addl Div 4000"; do you see that?

A. Yes.

Q. And do you see that the \$10,627.52 and the 4000 are added together?

A. Yes.

Q. Did you testify about that \$4000 entry before the special agents?

A. I don't remember.

Q. Did you tell the special agents on July 16, 1956 that you had no independent recollection of that figure?

A. I don't remember what I said at the time.

Q. When you were examined by them did you have any recollection of that figure?

A. I don't remember specifically discussing this particular figure either at the time of the examination or here.

Q. Am I correct that you have no independent recollection now as to that figure?

A. I do have.

Q. And what is that recollection?

A. My recollection is that that is the amount given to me by the Doctor^r covering dividends personally held and registered in his name for the year, 1950.

Q. Do you remember when you got it?

A. No, I don't remember the date I got the information.

Q. Do you remember where you got it?

A. No.

Q. I take it this was one of these lump-sum figures that was given to you verbally?

A. Yes.

Q. Now, there is a figure in the following year of \$3800 which appears on the worksheet for that year which would be the tax year 1951. Did the Doctor for the tax year 1951 give you personally any figure, lump sum or otherwise, with respect to the dividends received by him on these personally-held stocks?

A. I don't remember whether he gave it to me or not.

Q. That was the year, Mr. Sanfilippo, when you were away—

A. That is right.

[fol. 173] Q. —from January to April?

A. That is right.

Q. Does it refresh your recollection that he did not give you that figure for that year?

A. No.

Q. It may be, then that he did give you the figure for that year before you went away?

A. Yes.

Q. Did he give it to you in a lump-sum that year?

A. I said I don't remember I did receive it or not. Therefore I cannot say how he gave it to me, if he did give it to me.

Q. But you say it may well be that he gave you that \$3800 figure that is in there in those 1951 worksheets?

A. He may have given it to me, yes.

Q. And then if that happened you, in turn, gave it to Mr. Amoruso?

A. Yes.

Q. Generally speaking, were you the one to whom the Doctor gave the information relating to the stock transactions as distinguished from Mr. Amoruso?

A. Yes.

Q. Over the years, of course, Mr. Amoruso was merely an employee of yours, years ago?

A. Yes, prior to 1948.

Q. And then he stayed with you and advanced in life and ultimately became a partner, is that right?

A. Yes.

Q. But I take it that you were the one with whom the Doctor would discuss such a personal matter as his total dividends from personally-owned stocks, is that right?

A. Yes. He would discuss them mostly with me but not exclusively.

Q. Now, in your testimony before the agents on July 16 you were asked at page 28 or 27:

"Q. On the summary of dividends received doesn't the sheet show a sub-total of \$10,627.52?

A. Yes."

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Q. (Continuing) "Q. And then another notation which is marked 'additional dividends \$4000' and a total there of \$14,627.52. Could you explain the meaning of this schedule?"

[fol. 174] You answered: "I had no independent recollection of it except as stated before in the prior year it may have covered some information submitted to us, and amount of dividends probably given to us by the taxpayer—probably the stock registered in his name as in the prior year."

Did you hear that answer as I read it to you?

A. Yes.

Q. Did that accurately record or reflect the state of your recollection at the time you gave it?

A. Yes.

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Q. Mr. Sanfilippo, when you were on direct examination by the United States Attorney you were asked a question

and there came up the incident or the fact, the question as to what the defendant said to you after the tax investigation had been begun, as to how the errors had occurred.

You testified at page 285 of the record as follows—and I am breaking in in the middle of a sentence but I think I have accurately described the background:

“And he told me that there were some errors made evidently and he would check his records.”

Then you may recall that later on in the cross-examination I reminded you of that testimony and asked you what records; do you remember?

A. Yes.

Q. Now is it not a fact that what Dr. Palermo actually told you was that he had no records that he kept of these transactions; isn't that what he told you?

A. Well, I don't remember the conversation word for word but I think it is more or less along those lines, yes.

Q. In other words, the Doctor never told you, Mr. Sanfilippo, that he would go back and check his records?

A. No. By the word “records” we usually mean—accountants usually mean papers of any type. Statements would constitute records. Therefore it is a broad word I probably used there to indicate any kind of documents, statements or anything else.

[fol. 175] Q. If you had received any brokerage statements, you had them, did you not?

A. We did not have all of them at various times.

Q. Did he not say to you in substance that you had all the records that he had?

A. He had said that several times in prior years too, and then he found that he had some of the other statements upon further inquiry.

Q. And it very often happened that you folks asked for his records and he said you had them, and you found that you did have them?

A. That is right.

Q. All right. So I take it now that you certainly do not intend the jury to believe that you are saying under oath that after this tax investigation occurred or began, the Doctor said to you in words or substance, “I will have to go back and check my records”; isn't that right?

A. Just as I explained before, rechecking whatever papers he had or data that he had is what I meant to bring out.

Q. Did he produce any?

A. During the time of the examination?

Q. Yes; and I am not talking about records for 1952 either. May I clear this up.

A. Yes.

Q. In 1953 after the investigation began did the defendant then produce for you any records, papers or documents relating to 1945?

A. Not that I remember.

Q. All right. 1946?

A. Not that I remember.

Q. And see if I can't shorten it: did he produce for you at that time any records, old records from prior years?

A. Yes.

Q. Which ones?

A. He produced records in connection with the years of the examination, 1951.

Q. What records?

A. A diary, some broker's statements and cancelled checks and bank vouchers—cancelled checks and bank statements.

Q. Is it your statement to the jury that if the bank statements and cancelled checks can be traced back into [fol. 176] your firm's possession prior to the time they were transferred to Higgins, Brennan & Higgins, that you got them for the year 1950 some time after the tax investigation began?

The Court: I think he said 1951.

Q. As I understand what you are saying now, Mr. Sanfilippo, is that in 1953 after the tax investigation began the defendant gave you some old records relating to earlier years?

A. Yes.

Q. Did you keep any record of what he gave you?

A. No.

Q. This is entirely from memory?

A. Yes.

Q. And I have asked you what records, and you have said some brokerage statements. I take it you can't identify which of those he gave you after the tax investigation and which of them you already had?

A. No, I cannot.

Q. And I asked you about bank statements and you said yes, he gave you some of his bank statements and cancelled checks for prior years.

Now is that true of 1950?

A. I think at a later date—originally the examination was for 1951, and those are the ones he originally submitted to me. The 1950 may have been submitted at a later date when the agent included the years 1949 and 1950 in the examination.

Q. Is it your testimony now that the bank statements and cancelled checks for 1950 were not delivered to your firm until after the tax investigation began?

A. That is right.

Q. And is the same true of the bank statements and cancelled checks for 1951?

A. That is right, in a completed form.

Q. And for 1949?

A. Yes.

Q. Your firm never had any of them prior to the tax investigation, is that right?

A. No. We did have some of them at times but never [fol. 177] in completed form, never complete; bank statements and cancelled checks.

Q. Do you now say that from year to year the defendant sent you at least some of his bank statements and cancelled checks?

A. I don't remember saying that. I said some years we did have bank statements for the purpose of arriving at the interest on bank loans, and whatever checks were submitted were incidental and not requested by us.

Q. In other words, you make a distinction between his submitting records which you had not asked for and records which you had actually asked for; is that what was in your mind?

A. Partially.

Q. Now, he could send you down his bank statements

and cancelled checks from time to time without your ever knowing it; isn't that right?

A. It is possible, yes.

Q. They would come to the office or they could come to the office without your knowing it?

A. Yes.

Q. And, actually, as you sit there you haven't any knowledge at all, have you, that he did not send to you his complete bank statements and cancelled checks for 1950 on or prior to March 15, 1951?

A. To my best recollection, he did not.

Q. But my point is, from what you have testified you do not know; isn't that right? You were the senior partner of this firm; you had 10 or 11 clerks, I am pointing out to you that he may very well have sent his bank statements and cancelled checks to you, to your firm, regularly without your knowing it, is that right?

A. It is possible that he did it at times.

Q. What other records for prior years do you say he sent to you in 1953?

A. A diary showing the income from professional—

Q. You mentioned that.

A. That is all I can remember. Bank statements and some broker's statements.

[fol. 178] Q. Mr. Sanfilippo, I show you what has been marked Defendant's Exhibit F-6 for identification and ask you if it is a letter or a schedule in the form of a letter which was prepared by your office, signed by the Doctor, and submitted by your office on his behalf to Revenue Agent Mishler on April 20, 1953?

A. Yes.

(Defendant's Exhibit F-6 for identification received in evidence.)

Q. In this letter, Mr. Sanfilippo—

Mr. Newcomb: It is very brief and I will not read the figures, your Honor, but could I read the two lines, just the top of the letter, to the jury, so that they will understand what we are talking about?

The Court: Yes.

Mr. Newcomb: Ladies and gentlemen, this is a letter which the witness has described was sent to the Director of Internal Revenue, to Mr. L. J. Mishler, and it reads:

"Dear Sir: According to my best knowledge and belief, the following is a list of stocks held and dividends received for the years 1949, 1950 and 1951, inclusive, of those held by my brokers."

And then it sets forth a tabulation for each year.

Q. Was this prepared under your supervision?

A. Yes.

Q. Would you tell the jury what work you did in connection with its preparation?

A. We directed the Doctor to give us, to give me a list of all of the securities, and then to establish what changes took place in each one of those years, so that we could arrive at the number of shares held at each particular time, in order to arrive at what the dividends would be on these securities. And we discussed this and he, the defendant, was to get—

[fol. 179] Mr. McHugh: I am sorry, I cannot hear that.

A. (Continuing) The defendant was to get a listing of the various dividends from his broker so that a computation could be made covering the aggregate amount of dividends received from these stocks during those three years, 1949, 1950 and 1951, and this was submitted after preparation to the revenue agent as an amended return.

Q. I gather, Mr. Sanfilippo, that all your firm did with respect to this was set up this table on the basis of figures submitted, as you say?

A. Yes, except that we made the computations.

Q. You did no work of your own, is that so?

A. I did. I did. I made the actual computations after receiving the lists of stock held in each year, and after receiving the dividends paid in each one of those years, from the Doctor, who was in turn supposed to get it from his broker. I computed and made the necessary extensions and the summaries in order to submit this report to the agent as an amended return.

Q. Did you tell the defendant when you agreed to represent him in his tax case that all you were going to do would be transmit to the Bureau of Internal Revenue the figures submitted by him?

A. Not that I remember.

Q. Is that all you did?

A. No. I in effect remember telling him that I was going to submit this to the agents as an amended return and have him accept these figures for the purpose of closing out the case for the years covered, and, in fact, I did do that.

Q. Prior to the time, prior to the date of this letter, did you make any investigation of your own from either records the Doctor supplied to you or those which you already had to ascertain his stockholdings?

A. I don't remember exactly to what extent, but I did, to some extent.

[fol. 180] Q. What extent?

A. I don't remember exactly. It had something to do with getting a list of stocks and some records, whether it was from the brokerage statements available or from the bank—and that is all I remember.

Q. Well, did you look at the records that you already had in your possession, for example, the cash account, and did you go over the cash account?

A. I am not sure—

Q. You know that you did not do that, do you not?

A. Maybe I didn't get the question. I would like to have the question repeated.

Q. May I withdraw it and put what I hope will be a simpler question.

Did you make any effort to ascertain what brokerage accounts the Doctor had?

A. At what particular time?

Q. Before you wrote this letter?

A. Not completely, no.

Q. My question was, did you make any effort?

A. I made some effort.

Q. What?

A. Looked at whatever lists were supplied to me for the purpose of arriving at the items that we wanted informa-

tion on; in other words, what stock listings he had at the time.

Q. We have just shown you this morning and been over with you this morning, for example, a worksheet set up by your office relating to the cash account at Fox, O'Hara for the year 1951. Did you make any effort to get that cash account before you wrote this letter?

A. I don't remember whether those papers were available at the time.

Q. Well, Mr. Sanfilippo, what do you mean "available"? All you have to do is call the broker—

A. That is—

Q. Do you not?

A. No.

Q. With the Doctor's permission—are you stating to me that Fox, O'Hara would decline to supply you with a transcript of his account?

A. Yes.

Q. Did you ever try to do it?

A. Yes.

Q. And they refused?

A. Yes, they wanted a letter from the client, without which they would not give us information, except in one [fol. 181] or two instances we may have received some data, probably without consultations from their superior, but it is not general procedure.

Q. Did you ask the Doctor at any time prior to the preparation of this account to give you a letter to Fox, O'Hara?

A. I don't remember whether we did that or whether I—

Q. Are you intending the jury to infer from what you say that the reason why you didn't get the cash account was that for some reason or other Fox, O'Hara wouldn't give it to you?

A. I would simply state that we didn't make any effort to get the information from the broker, and we did make efforts in other directions to get the data without going into a complete audit of stocks that were registered in his name, and it would be very difficult for us to check.

Q. All right, sir. We have, have we not, arrived at least at this fact: you didn't do this work in connection with this Mishler letter, the letter to Mr. Mishler, because it would be difficult and required the expenditure of a good deal of time and energy?

A. Partially so, yes.

Q. I believe you testified earlier that you submitted this letter to the Government as a sort of amended return; is that what you said?

A. Yes.

Q. And did you offer at that time to pay the taxes indicated, such taxes as would be indicated by the additional income set forth in this letter?

A. Yes.

Q. The Doctor told you, did he not, that whatever he owed the Government he wanted to find out and pay it?

A. Yes.

Q. From your observations did the Doctor leave the handling of his tax case in your hands?

A. Yes.

Q. And you were his professional adviser and representative in the matter, is that right?

[fol. 182] A. Yes, in connection with the Mishler examination you are referring to, aren't you?

Q. Yes.

A. Yes.

Q. You had been appointed his attorney according to the regulations and the powers of attorney had been executed and duly filed?

A. Yes, sir.

Q. I show you Defendant's Exhibit B-7 for identification and ask you if it is a memorandum in your writing?

A. Yes.

Q. And did you upon an occasion when Mr. Mishler asked you to look at the Doctor's returns prior to 1949, did you refuse to permit Mr. Mishler to do so?

A. No.

Q. I ask you to look at the memorandum with me. Will you follow me as I read this.

(Defendant's Exhibit B-7 for identification received in evidence.)

Q. Will you follow me please while I read where I am pointing:

"Asked for copies of 1948 return and prior for purposes of comparison. Explained not relevant and not subject to examination. Statute run out. Not authorized in any years except 1949, 1950 and 1951."

The Court: "Not authorized"?

Mr. Newcomb: Yes, sir.

"On" as I read it, "any years except 1949, 1950 and 1951."

Q. Do you see that?

A. Yes.

Q. And does that refresh your recollection that Mr. Mishler wanted the earlier returns and you declined to give them to him?

A. Yes.

[fol. 183] Q. Then did Mr. Mishler ask you for a net worth statement of the Doctor and did you refuse to give it to him?

A. I have a recollection that I did.

Q. Did you consult with the Doctor beforehand as to whether you should make that refusal?

A. I believe that I did.

Q. When and where?

A. I don't remember exactly, about the time of the examination.

Q. Does a layman have any knowledge of what a "net worth" statement involves for tax purposes in a tax examination?

A. Some taxpayers, some clients, understand it and some don't.

Q. Let me put it this way: You were his professional adviser at the time, were you not?

A. Yes.

Q. Did you advise Dr. Palermo to supply the Government with a net worth statement?

A. No.

Q. Incidentally, as a certified public accountant, you knew that the preparation of a net worth statement would be a very time-consuming job, did you not?

A. Yes.

Q. Did you at any time prior to the termination of your employment as the Doctor's accountant and representative in the tax case attempt to prepare actual amended returns?

A. Yes.

Q. Is that the time when Irene LaPeter worked on it for a few weeks?

A. I believe she had some part in getting up the details for it.

* * * * *

Q. Would you fix the time for us, please.

A. I believe this was in the year 1953 or 1954.

Q. Was it early or late in 1953, if it was in 1953 at all?

A. I would say it would be late in 1953 or sometime in 1954. I also tried to submit that statement to the agent in lieu of an amended return.

[fol. 184]. Q. And he, of course, declined to receive it?

A. No, he accepted it subject to discussion and approval by his superior. He told me he could not accept it on his own but he would discuss it with his group chief.

Q. You don't seriously mean that you submitted this as an amended return?

A. As an amended return to the questioned items, which was dividends. That was the only question at the time that this amended return was made up.

* * * * *

Q. I show you Defendant's Exhibit I-4, a schedule of profit and loss from business or profession.

Do you see that the heading appears to be in the handwriting of your partner, Mr. Amoruso? Do you see that?

A. Yes.

Q. Will you look at any of the figures and tell us, if you please, whether they are all his, so far as you can see?

A. They appear to be.

Q. None of them, I take it, are yours?

A. No.

Q. Now, is there a notation here in pencil which is circled that is in your handwriting?

A. It does not appear to be my handwriting.

Q. Do you recognize whose handwriting it is?

A. No, I don't.

Q. Do you read the words "figures submitted by AMP" —it looks like.

A. It appears to be "figures submitted." I can't make out the last initials, whether it is "AMP" or just a certain amount of scribbling, it looks to me like; I can't make it out.

Q. Now, there appears an erasure under that circling, does there not?

A. Partly, yes.

Q. Can you tell us whether or not what was erased was "all figures are estimates" or words to that effect? Will you look at it?

A. I can't distinguish any of the erased portion.

[fol. 185] Q. Mr. Sanfilippo, I show you what has been marked Defendant's Exhibit S for identification and ask you if it is your firm's retained copy of the defendant's 1948 tax return, being pages 1, 2 and 3 thereof?

A. Yes.

(Defendant's Exhibits S, T, U and V for identification received in evidence.)

Q. Mr. Sanfilippo, looking at the first page of the 1948 retained copy, in the upper righthand side, where I am pointing, do you see some initials in a circle?

A. Yes.

Q. Whose are those?

A. I am not sure but they appear to be Miss Artino's.

Q. And then underneath that do you see the words "Signed copy attached"? In whose handwriting is that? Do you want to use the glass?

A. That appears to be my writing.

Q. That means a signed copy of the return, doesn't it?

A. I don't know. It could be a signed copy of the return by the taxpayer or it could be a signed copy of the return by us.

Q. Is not the plain meaning of your notation, to your own knowledge, that when this piece of paper, the pencilled copy, was handed to the girl to type, there was annexed to it a copy of the return signed in blank by the taxpayer?

A. Not necessarily; I wouldn't say that.

Q. What meaning, please tell the jury, do you say that notation in your handwriting has?

A. As I explained, it would indicate that there is a signed return attached, which could be a signed return by us as preparing the return or a signed copy of the return by the taxpayer. It could be either one or the other.

Q. Let us examine that for a moment. You are saying that the return could have been typed, examined, checked and signed, and then put back with this retained copy, and then somebody put on it "Signed copy attached"; is that your statement?

A. Partly.

[fol. 186] Q. Now, as I read this, it goes a little farther. The way it actually reads is, "Signed copy attached. Type A. R. S." And what that means is you have approved it for typing and have given the girl this with a signed copy attached and instructed her to type it; isn't that right?

A. After the word—no.

Q. All right. Does this refresh your recollection that 1948 was one of the years in which the defendant's return was signed in blank by him?

A. I have no independent recollection.

New York, December 16, 1957;
10:30 o'clock a. m.

Q. Mr. Sanfilippo, am I correct that in the case of the Doctor your firm did not make any typed copies of his returns?

A. As far as I can remember, we did not.

Q. You only had the pencilled copy of the type which we have identified here?

A. Yes.

Q. And those pencilled copies were regularly kept in your files until sometime in 1954 when they were delivered to the defendant and then to Higgins, Brenner & Higgins?

A. Yes.

* * * * *

Q. Mr. Sanfilippo, you were aware of the fact that the defendant had substantial bank loans secured by stocks?

A. Yes.

Q. Do you recall that?

A. Yes.

Q. And did you make any effort in 1948, 1949, 1950 or 1952 in connection with the preparation of his returns to find out what stocks he owned that were pledged with the banks?

A. We made some effort only in connection with a certain purpose, and that was to establish the interest charges.

Q. As an accountant did you not know that in order to prepare accurate returns for the Doctor you would have to [fol. 187] have a list of his securities that were pledged to the National City Bank and the Corn Exchange?

A. I would know that only if I were engaged to make a complete audit of that particular feature.

Q. Well, I didn't ask you whether you would know the details; I asked you whether as an accountant you did know that in order to do a proper job you would have to have that information?

A. No, sir, I did not.

* * * * *

Q. Let me approach it directly. Is it not a fact that your firm left undone work necessary to prepare a proper return for the Doctor?

A. No.

Q. Is it not a fact that you were not receiving, according to your view, sufficient compensation to justify what you call an audit?

A. Yes.

Q. And do you agree with me that if you had performed what you call an audit you had information and notice sufficient to prepare a proper return?

A. No.

Q. Is it not a fact that you would have charged at least a thousand dollars or more for what you call an audit?

A. Yes.

The Court: Is that for each year?

The Witness: Yes, your Honor.

Q. Mr. Sanfilippo, on the subject of compensation, who delivered your children when they were born?

A. Dr. Palermo.

Q. Who took care of your wife and children year after year?

A. With respect to what?

Q. To taking out their tonsils, taking care of their aches and pains?

A. In a good many case, Dr. Palermo.

Q. Did he ever charge you anything for that?

A. No, not that I know of.

Q. Did he ever ask you anything for it?

A. No.

[fol. 188]

Redirect examination.

By Mr. McHugh:

Q. Mr. Sanfilippo, I show you Defendant's Exhibit B-7 in evidence and I want you to tell the Court and jury what that is, please.

A. It is a memorandum that I made in connection with a conversation with the agent, Mr. Mishler, covering the income tax examination.

Q. I direct your attention to the date at the top, sir, and ask you if you can tell us if this memorandum was made on one of those dates or both or what?

A. That was made on both dates.

Q. The jury does not have it before them so would you tell us what those dates are, please?

A. July 21, 1953 and November 13, 1953.

Q. Now as to the next matter, the entry under the words "Rosina Palermo, stock broker's account—Fox, O'Hara—Dr. A. M. P. beneficial owner".

Does that refresh your recollection as to what you talked with Mishler about and when, sir?

A. Well, that point refreshed my memory to the extent that part of the discussion was in connection with Rosina Palermo's stock broker's account.

Q. When was that, on July 21st or November 13th or both?

A. I cannot definitely state as to whether it happened on one date or the other.

Q. Do you recall who brought up the subject of Rosina Palermo dividend income, you or Mishler?

A. Mr. Mishler.

Q. Did you know before that time that there was any income in the name of Rosina Palermo during the years 1950 to 1952 inclusive?

A. No.

[fol.189] ANTHONY VINCENT AMORUSO, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. McHugh:

Q. Mr. Amoruso, you are a certified public accountant, are you not?

A. I am.

Q. And you are a partner in the firm of Arthur R. Sanfilippo & Co.?

A. I am.

Q. Mr. Amoruso, when did you join that firm?

A. I became a member of the firm in January 1948.

Q. Prior to that time were you employed by them?

A. I was.

Q. When did you start that employment?

A. Well, in mid '47 I was employed, and prior to having entered the Army back in '36 and '37 and subsequent to graduation from school, from Manhattan College—I can't remember the exact date—but I know it was '38 or '9.

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Q. And when did you become a partner in Arthur R. Sanfilippo & Co.?

A. January 1948.

Q. You know the defendant, do you not, Dr. Palermo?

A. I do.

Q. How long do you know him?

A. I would say about 30 years.

Q. How old are you, sir?

A. I am 41 next month.

Q. During the course of your employment by Sanfilippo & Company you worked on the defendant's tax returns at various times, did you not, sir?

A. I did.

Q. Are you familiar with the procedures used in preparing his tax returns?

A. Yes.

Q. Mr. Amoruso, I show you Government's Exhibit 628 for identification, which is a photostatic copy, and ask you if you recognize that?

A. Yes, this is my handwriting.

Q. What is it, sir?

A. The 1948 United States individual income tax return of Anthony Palermo.

Q. And that is the pencil copy prepared by your office, is that right, sir?

A. Yes.

Q. In fact, prepared by you?

A. Mostly.

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(Government's Exhibit 628 for identification received in evidence.)

Mr. McHugh: Your Honor, I am taking from the 1948 work papers which are now in evidence as Defendant's Exhibit O-7 collectively, a work paper which should be marked further for identification for the record, and defense counsel has suggested the reference O-7-B in evidence.

Q. Mr. Amoroso, I show you Defendant's Exhibit O-7-B and I ask you to tell the Court and jury what, if anything, on that sheet is in your writing?

A. This is all in my writing.

Q. Where did you get the figures for the dividend and interest expense that are entered on this Exhibit O-7-B?

A. These figures are taken from broker's statements that were submitted to us for the year 1948 and entries for dividends and entries for interest charged by the broker is listed from the broker's statements.

Q. Do you recall the name of the brokerage firm, sir?

A. Not offhand.

Q. Was it Fox, O'Hara & Company?

A. It could be.

[fol. 191] Q. Now, sir, below the total in the dividend column of \$3,230, do you find another figure "Plus 1390" in a circle?

A. That is right.

Q. Where did you get this figure of \$1390?

A. That is information received from the Doctor.

Q. Do you know where and when you received it?

A. Well, to the best of my recollection this \$1390 is information submitted by the Doctor to either Mr. Sanfilippo or to me directly. Exactly when I can't tell.

Q. Now, sir, you have added that \$1390 to the dividend figure?

A. That is right.

Q. You said you can't tell us exactly when you got it. Can you tell us approximately when you got it?

A. I would say some time in February, 1949.

Q. And that is the approximate date?

A. That is right.

Q. Was that 1390 a dividend figure also?

A. That is dividends.

Q. Do you know on what stock or stocks those were dividends?

A. I have no idea.

Q. Do you know if it was on stocks that the defendant held personally or not?

A. Well, as I recall, the additional amount represented dividends on personally-held securities.

Q. This is an additional amount, sir?

A. That is right.

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Q. Mr. Amoruso, you have a figure here at the left under "Interest expense" of \$1752. Is that in your writing?

A. It is.

Q. Where and when did you obtain that figure, sir?

A. Well the same thing applies there as applies to dividends. That is information submitted by the Doctor either to Sanfilippo or to me directly.

[fol. 192] Q. When, sir?

A. In 1949; around February of 1949.

Q. Now there is an entry below that "National City" and some figures under that, it looks like 2000 times 4.

Is that in your handwriting?

A. It is.

Q. Where did you get those figures and when?

A. This is information by the Doctor either to Sanfilippo or myself.

Q. Now, sir, what dividend figure is entered on Exhibit 628 before you?

A. The dividend figure on the income tax return is \$4,620.

Q. And what interest expense figure is entered there, sir?

A. On page 3 the interest on loans is \$3,909.52.

Q. Now, there is a schedule of professional income by the defendant entered in Exhibit 628, is there not, sir?

A. Yes.

Q. Can you tell us where and when you got those figures?

A. Well, as I recall most of the information on professional income and expenses was gotten by Sanfilippo at his conference with the Doctor.

Q. And will you look at Schedule C and tell us what if anything on that schedule is in your handwriting.

A. Schedule C is in my handwriting.

Q. Entirely, sir?

A. Except the word "Physician" written at the top of the schedule.

Q. Do you, in fact, know, sir, where this figure of \$8,490 came from in 1948?

A. This was information submitted by the Doctor.

Q. To you, sir?

A. No, not directly to me. I would say—

[fol. 193] Q. Now I direct your attention to Schedule G, the schedule headed, An explanation of columns 4 and 5. That is a breakdown of the defendant's professional expenses, is it not, sir?

A. That is right.

Q. Where did you get the figures entered in that schedule? They are entered in your handwriting, first of all, are they not?

A. They are.

Q. Is it your testimony that these figures for contributions came to you either from the defendant or from Mr. Sanfilippo?

A. Yes.

Q. As to the words and figures 3909.52 following interest, is that all in your writing?

A. Yes.

Q. Where did you get that figure from?

A. The interest deduction appears on this schedule here, the interest from the broker's account, plus the other items from Corn Exchange Bank and National City Bank.

Q. As to those items on Defendant's Exhibit O-7-B, interest on Corn Exchange Bank and National City Bank, do you know where you got those?

A. Well, these were—the listing here comes from the broker's statements that were submitted.

Q. Yes, but I am directing your attention now to the two below that.

A. These items here I can't remember whether I received them directly or they were requested from Sanfilippo.

Q. Was it one of those two?

A. It is one or the other.

Q. I take you back, sir, to the figure you had trouble with before, professional income \$8490 in Schedule C. Did you receive that from Mr. Sanfilippo or from Dr. Palermo?

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[fol. 194] Q. Can you answer that question, sir?

A. All I can only say, I received it from either Dr. Palermo or Mr. Sanfilippo after a conference • • •

• • • • •

Q. • • • Now directing your attention again to Schedule D at the bottom of page 2, being a breakdown of the defendant's professional expenses, where did you get that from? Was that from Dr. Palermo or Mr. Sanfilippo?

A. Yes.

Q. Either one?

A. Either one.

Q. Now, sir, there is a schedule of gains and losses which is a part of Exhibit 628 in evidence and I ask you if this is entirely in your writing?

A. It is.

• • • • •

Q. There is something that I want to ask you on this 1948 return before we leave it. Referring again to Exhibit 628, do you see, a note at the upper righthand corner, "Signed copy attached"?

A. Yes.

Q. Is that in your writing, sir?

A. No.

Q. Do you know whose writing it is?

A. No, I don't.

Q. Do you know, sir, whether your firm ever received in the years 1948 to 1952, inclusive, any signed blank returns from the defendant?

A. I believe that we had one, one signed copy there in those years that I can recall.

Q. Which year?

A. I think it was '51, as I recall.

Q. Looking at that note in the upper righthand corner, "Signed copy attached," does that refresh your recollection as to whether this was the year, 1948?

A. No, I don't recall. That may have been in there—no, I don't remember.

Q. Now, Mr. Amoruso, I show you Government's Exhibit 5 in evidence and I ask you if that is your signature that appears at the lower lefthand portion of the first page?

A. That is mine.

[fol. 195] Q. Does that indicate that this return was prepared under your supervision, sir?

A. Yes.

Q. I call your attention to the signature Anthony M. Palermo just to the right of your signature.

A. Yes.

Q. Do you recall whether or not that return was signed when you signed it?

A. No, I don't.

Q. And the date 2-25-50—do you know who wrote that in?

A. I did.

Q. When you dated the return was it signed?

A. I don't recall.

Q. It could have been but you don't recall?

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A. I don't recall whether it was signed or not when I signed the return.

Q. I show you Government's Exhibit 629 in evidence, being a photostat of the office draft and I ask you to look it over and tell us whether you prepared it.

A. I prepared this tax return.

Q. Pardon?

A. I prepared this tax return.

Q. Now do you see a figure in that Exhibit 629 for dividends?

A. Yes.

Q. Do you see that?

A. Yes, I do.

Q. Where did you get that figure from?

A. Well, in the procedure on dividends it would be to extract the dividends from the broker's statements, plus dividends, additional dividends received directly, and the information submitted by the Doctor on personally-held securities and the one figure was incorporated into the tax return.

Q. Where specifically did you get this figure from, is what I asked you?

A. Well, I would like to see the papers before I could identify where I got it from.

Q. I give you, sir, the defendant's Exhibit S-7, being the 1949 work papers of your firm (handing):

A. (After examining). No schedules in there.

Q. I direct your attention to the sheet that is the sixth page down in Government's Exhibit 629. Do you see a figure there?

A. Oh, yes.

[fol. 196] Q. After the word "dividends" or "div earned."

A. This is dividends earned, \$5131.

Q. In whose writing is that?

A. This is Mr. Sanfilippo's writing.

Q. Does that refresh your recollection as to where you obtained the figure for dividends that you entered on page 1?

A. I picked up the figure for dividends from this sheet that Sanfilippo prepared and I entered \$5131 in the dividends.

Q. Looking further at Exhibit 629, the tax return, would you tell us if you know where you got the figure for the defendant's professional income?

A. Well, there is a figure on here, gross income fees \$9581.

Q. Again referring to the memorandum in Mr. Sanfilippo's writing?

A. Yes, that's right. I am referring to this memorandum prepared by Mr. Sanfilippo.

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Q. Now just to clarify the latter part of your testimony, you got the professional income from that little slip in Mr. Sanfilippo's writing?

A. That's right. I entered the income, gross income fees of \$9581 on Schedule C under Total Receipts.

Q. Now, sir, where did you get the figure that you entered for the defendant's expenses in connection with the practice of his profession?

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A. I am saying the information for the professional expenses was received from the Doctor, the information submitted by him.

Q. Now, sir—

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Q. Was it submitted to you?

A. Well, either directly to me or to Sanfilippo.

[fol. 197] Q. Do you know, in fact, where you got those figures, was it from the Doctor or was it from Mr. Sanfilippo?

A. Well, I can't remember from which one I got it from.

Q. Well, perhaps I can help you.

A. The information on the slip—

Q. Excuse me, sir.

A. Sanfilippo has a total expenses of \$4935.

.

Q. Mr. Amoruso, you just pointed out that the slip in Mr. Sanfilippo's writing below the words "Gross income

from fees," lists the word "expenses" or "exp. \$4935." Is that right?

A. That's right.

Q. Now here on Schedule D you have a breakdown of his expense figures in connection with the expenses incurred in the practice of his profession, do you not?

A. I do.

Q. Do you see the total of \$4264.84?

A. Right.

Q. Is that in your writing?

A. All these figures here on the total is not but these figures—they are not my writing.

Q. The total is not in your writing?

A. No.

Q. But all of the figures that are in the column which was the basis of that total are yours, is that right?

A. Yes.

Q. Now can you tell us where you got those figures?

A. I got those figures from Dr. Palermo.

Q. You got them from him personally?

A. As best as I can recall I received it from the Doctor. I can't recall any further than that.

Q. Now there is an entry on page 3 of this return, several entries, after the word "contributions." Do you see that?

A. Yes.

Q. Are those words and the figures in your writing?

A. Yes.

Q. And can you tell us where you got that information from?

A. I got that information from the Doctor.

[fol. 198] Q. Personally?

A. As best as I can recall.

Q. And as to the interest items, can you tell us where you got that from?

A. Well, the interest items was information from the slip prepared by Sanfilippo, a figure here of \$1050, it looks like National City, and one for \$1500 from Corn.

Q. And that adds up to a total of \$2550, does it not?

A. That's right.

Q. Now would you look at the figure that you entered in the column for interest expense or interest deductions?

A. I have \$2830.10.

Q. Do you know where you got the balance of that figure, that is, the \$780.10?

A. I got that figure from Dr. Palermo for the balance.

Q. When did you get that figure from Dr. Palermo?

A. It must have been during February 1950.

Q. Was that when you got the other figures too?

A. Yes.

Q. Did you get them in a personal visit or on the telephone?

A. On the telephone.

Q. Were they all given to you orally?

A. As best as I can recall, plus these memorandums from Sanfilippo.

Q. Now, Mr. Amoruso, I show you Government's Exhibit 630 in evidence, which is a draft copy of the return prepared by your firm for 1950, is it not?

A. That is right.

Q. Did you prepare that, sir?

A. None of this is in my writing.

Q. And do you see the word "Note" up at the upper lefthand portion of that exhibit?

A. I do.

Q. Was that printed by you?

A. It was.

Mr. McHugh: May I see the original of that page, Exhibit YY in evidence?

(Exhibit handed to Mr. McHugh.)

[fol. 199] Q. Mr. Amoruso, immediately following the word "Note" there there was some writing that was rubbed out.

A. I can't read any of this here.

Q. Can you see that there was some erasing done?

A. There was an erasure but I can't read what was there.

Q. Do you know what the "Note" said?

A. I can't recall that.

Q. Do you know if in fact the note said anything about "Filed blank return"?

A. I can't recall that.

Q. And does the presence of that word "Note" refresh your recollection as to whether or not there was a signed blank return by Dr. Palermo for this year?

A. No, I don't recall.

Q. Mr. Amoruso, I show you Government's Exhibit 2 in evidence and I ask you to look at the signature at the lower lefthand portion of that return. Is that your signature, sir?

A. It is.

Q. Did you write the date after the signature?

A. I did.

Q. Did you write the date after the signature Anthony M. Palermo?

A. I did.

Q. Was that return signed in blank when you signed it, sir?

A. This is the return I recall was signed.

Q. In other words, the signature of the defendant was already on this return when you signed it, is that right?

A. As I recall it, yes.

Q. Now, sir, I show you Government's Exhibit 631 in evidence. That is the photostatic copy of the draft return prepared by your office for this defendant for the year 1951, is it not?

A. It is.

Q. Would you look that over and tell us whether you prepared that or substantially all of it?

A. I prepared this tax return.

Q. Now did you compute the tax as reflected on page 1 of that return, sir?

A. Yes.

[fol. 200] Q. I direct your attention to Schedule C summary, showing a figure of \$4986.72 as net profit. Where did you get that figure from, sir, if you know?

A. That is carried over from Schedule C, profit or loss from business or profession.

Q. Now, sir, you are referring to Schedule C in Exhibit 631?



A. That's right.

Q. Is that schedule entirely in your writing?

A. Yes, with the exception of this writing here, "Figures submitted," that's not my writing.

Q. You are referring to the words "Figures submitted" in a circle?

A. That's right.

Q. Do you know whose writing that is?

A. No, I don't recognize it.

* * * * *

Q. Do you know, sir, where you obtained the income figures that are carried from Schedule C on Exhibit 631?

A. Those are figures that may have been submitted by Dr. Palermo.

Q. Were they given to you by Dr. Palermo or by Mr. Sanfilippo?

A. I believe this here, it was given directly to me.

Q. In fact, Mr. Sanfilippo was out of town in that year?

A. That's right.

Q. Does that refresh your recollection as to where you got it?

A. Well, I mean, I was just going to say, I believe that's the year Sanfilippo wasn't present, and I believe, as I remember, I got all of these figures from the Doctor directly this year.

* * * * *

Q. Mr. Amoruso, I show you Defendant's Exhibit M-4 in evidence, being a list of dividends with a heading "A. M. Palermo, 1951 dividends" at the top.

Will you tell the Court and jury, please, whether all or any of that is in your writing?

A. Most of that is in my handwriting.

[fol. 201] Q. What is there on that sheet, if anything, that is not in your writing?

A. These little figures encircled in red is not in my writing.

Q. All the rest of it is yours?

A. Yes.

Mr. McHugh: * * * Your Honor, may we have these three worksheets from Exhibit U-7 which are all already

in evidence marked for identification in accordance with the schedule that the defendant's counsel has prepared?

The Court: Yes.

Mr. McHugh: This sheet headed "A. M. Palermo Cash Account Stock Transactions, Fox, O'Hara" will be Defendant's Exhibit U-7-A in evidence.

(Marked Defendant's Exhibit U-7-A in evidence.)

Mr. McHugh: U-7-B will be a sheet headed "A. M. Palermo, Cash Account, Short Term, Fox, O'Hara."

(Marked Defendant's Exhibit U-7-B in evidence.)

Mr. McHugh: Exhibit U-7-C will be the worksheet headed "A. M. Palermo, Stock Transactions, Fox, O'Hara Margin Account."

(Marked Defendant's Exhibit U-7-C in evidence.)

By Mr. McHugh:

Q. Now first of all, Mr. Amoruso, would you tell us please where you got the figures which you entered on Defendant's Exhibit M-4 in evidence.

A. This is the summary of the dividends, and the figures came from the analysis of the dividends on the broker's statements on this sheet—

[fol. 202] Q. Referring to U-7-D—

The Court: Is that D or B?

Mr. McHugh: D.

A. Yes.

Q. Now, U-7-D, as I read it, gives a breakdown of dividends, \$9,775.73, is that correct?

A. That is right.

Q. And on Exhibit M-4 in evidence there is a breakdown for the total of dividends amounting to \$13,575.73, is that correct?

A. That is correct.

Q. Where did you get this total breakdown, can you tell us that?

A. Well, the additional amounts aggregating \$3,800 I received from Dr. Palermo.

Q. You received them personally?

A. Yes.

Q. When, sir?

A. At the time I was preparing the return early in 1952.

Q. Now, at the right of Defendant's Exhibit U-7-D in evidence do you see the words "Corn" and the letters "Est".

A. You mean Corn Exchange?

Q. And that is just to the right of the words "Other Interest Expense" with a question mark; is that right—"Exp."?

A. That is right.

Q. Is that in your writing?

A. It is.

Q. And below that are the figures and words 100 per month—or it says "mo est." Is that in your writing?

A. That is my writing.

Q. Where did you get that information, sir?

A. I got this information from Dr. Palermo.

Q. And that represented interest expense on his loan at the Corn Exchange Bank, is that it?

A. That is right.

Q. And you have written here "100 per month, est." Does that mean estimated?

A. Yes.

[fol. 203] Q. Who estimated it?

A. That was the Doctor's estimate.

Q. And then I see in the lower portion of Defendant's Exhibit U-7-D some writing over two columns, one headed "Broker" and one headed "Bank."

Do you see that, sir?

A. Yes.

Q. What is that writing up above? That is your handwriting, is it not?

A. Yes.

Q. Will you tell us what that writing is.

A. Personal expense.

Q. All right. And under the lefthand column there headed

"Interest Expense", under the word "Broker" are those dates and figures in your writing?

A. No, just the title.

Q. Do you know who wrote the figures?

A. I don't know.

Q. The total, though, is your writing, is that correct?

A. That is right.

Q. And that represents a total interest expense from the brokerage account for the year, is that correct?

A. That is correct.

Q. When you worked on this sheet U-7-D, did you have the defendant's margin account statements for 1951 before you?

A. Yes.

Q. Now, off to the right on the lower portion there are the words "Bank" and below that, "Interest expense," and then a column of figures.

Do you find that, sir?

A. That is National City Bank interest.

Q. And what was your source of that information?

A. Those items appear on the debit memos that the bank charges against a person's account, and, as I recall, we had received a group of the debit memos and listed them so as to arrive at the interest expense.

[fol. 204] Q. Now, the last figure in that column which you said reflects National City Bank interest bears next to it the letters "Est."

A. That is right.

Q. Is that in your writing, sir?

A. That is mine.

Q. Does that mean "estimated"?

A. Yes.

Q. Who gave you that estimate, anyone?

A. Dr. Palermo.

Q. When did he give you that, sir?

A. At the same time he gave me all the other information as to the balance of the dividends and the interest here for Corn Exchange.

Q. Was that given to you orally or in writing?

A. No, over the phone.

Q. And then the total of that column, \$6,138.24, is in your writing, is it not?

A. Yes.

Q. And then you totaled all of the interest items off at the lower righthand portion of the Exhibit U-7-D in evidence, did you not, sir?

A. I did.

Q. And did you carry that total over to the income tax return for 1951, sir?

A. Yes.

Q. The upper portion of U-7-D reflects the defendant's dividends income in the Fox, O'Hara margin account in the year 1951, does it not?

A. That is correct.

Q. Are there any other entries that you see there that are in your writing?

A. I wrote "Giant Portland Cement," \$12.50.

Q. Thank you. Are there any other entries on that U-7-D that are yours?

A. There is \$50 in the Motor Products and \$160 in Minneapolis-Moline.

Q. Is that all, sir, aside from the totals and figures you have already referred to?

A. That is all.

Q. I hand you two sheets which are in evidence marked respectively Defendant's Exhibits U-7-A and U-7-B, and [fol. 205] I ask you if you prepared all or any of those sheets?

A. Both of these sheets are in my handwriting.

Q. Pardon me, sir.

A. Both of these sheets are in my handwriting.

Q. Now looking first at Exhibit U-7-A, do you see at the top a list of some nine stocks which bear entries under a column "Sales" after them?

A. Yes.

Q. What did you have before you, sir, when you made up the sheets U-7-A and U-7-B?

A. Fox, O'Hara cash account.

Q. Of the defendant?

A. Yes.

Q. Now, did you pick up those nine sales listed at the top from the defendant's Fox; O'Hara cash account for 1951?

A. Yes.

Q. Now where did you get the information with respect to the date of purchase and the cost of purchase of these stocks?

A. I got that information from Dr. Palermo.

Q. How, sir? Orally or in writing?

A. No, verbally, on the phone.

Q. At what time, sir.

A. At the time I prepared the return.

Q. Now, sir, I see that there are a series of figures all but one of which are encircled after these nine named-stocks. Do you see that?

A. Yes.

Q. Do you see these entries, "34.2; 34.2" repeated; "6.4", and so on?

A. Yes, I do.

Q. Now what do those indicate?

A. Those are the quotations given to me by the Doctor as to cost.

Q. And are those figures the ones you used in computing the cost basis of these stocks?

A. That is right.

Q. And on Defendant's Exhibit U-7-B in evidence do you have that before you?

A. Yes.

[fol. 206] Q. There is an entry in the sales column after just one of these stocks, Southern Pacific, is that right, sir?

A. That is right.

Q. Is that in your writing?

A. Yes.

Q. That stock was purchased, according to this exhibit, 5/9/51, is that right?

A. That is correct.

Q. Did you get that information from the cash account itself?

A. Yes.

Q. Or from the defendant?

A. I got that from Fox, O'Hara cash account.

New York, December 17, 1957,
10:30 o'clock a. m.

Direct examination (Continued).

By Mr. McHugh:

Q. Now, Mr. Amoruso, when we suspended yesterday we were talking about these Exhibits U-7-A through U-7-D.

As I recall it, you had told us that you had computed the gains and losses reflected on the worksheets which are U-7-A and U-7-B; is that correct?

A. That is correct.

Q. Now, sir, I direct your attention to the worksheet which is Exhibit U-7-C that bears the notation at the top "Margin Account"; is that right?

Q. And those words "Margin Account" are in your writing, are they not?

A. That is mine.

Q. Could you tell the Court and jury which writing on the sheet is yours?

A. The writing below which commences "Date", and "Cost", where it says, "Stewart-Warner, Motor Products, Thermoid"—

Q. I am sorry. Would you speak up, please? I can't hear you.

A. The writing which commences down about line 35 or 40 where it says "Stewart-Warner, Motor Products, Ther-[fol. 207] moid and Eversharp." That is my writing, and the figures right alongside.

Q. Where you list those five stocks at the bottom, the date—which is the date of purchase, is that right?

A. That is right.

Q. And the cost is the purchase price?

A. That is right.

Q. And to the right of that there are some little figures encircled; do you see those?

A. Yes.

Q. Are those your figures too, sir?

A. Yes.

Q. What are they?

A. Those are the quotations.

Q. Where did you get those from, sir?

A. These are figures I got from Dr. Palermo as to the cost and dates of purchase of the various stocks that are shown on the righthand side under "Sales".

Q. Which figures did you get from him, the little figures in the circle?

A. That is the quotation, yes, as to the price—

Q. In other words, if I may interrupt you, since the jury does not have it before them, these figures "18, 18, 24.5, 17 and 12¾" are per-share prices—

A. That is correct.

Q. (Continuing) —given to you by the defendant, is that right, sir?

A. That is right.

Q. And then did you compute the figures in the cost column on that basis?

A. Yes, I did.

Q. Now, these figures under the date column which you said indicate date of purchase—were they given to you by the defendant?

A. Yes.

Q. And those are all year dates of purchase excepting the last one, which is a specific date; is that right, sir?

A. That is correct.

.

Q. Did you compute all the profits and losses shown on this sheet, sir?

A. Yes.

.

[fol. 208] Q. Now I direct your attention to schedule D of Exhibit 631 in evidence, which is the capital gains sched-

ule of profits and losses, and I ask you if you computed that?

A. Yes.

Q. Are the figures on it all yours?

A. Yes, they are.

Q. What was the basis of that computation?

A. Well, the Schedule D is the summary of the short and long-term gains and losses from these various schedules that I prepared.

Q. Where did you get the information that you put into Schedule D?

A. From these schedules here.

Q. Referring to the work papers, sir?

A. Yes, U-7-B and U-7-C—

Q. Those are U-7-A through U-7-D, is that right?

A. That's right.

Q. I show you the original copy of Schedule D, which is Defendant's Exhibit H-4 in evidence, and I ask you, sir, to tell the Court and jury what the figures are for 1951 with respect first to long-term capital gains or losses; just tell us what the total result there is.

A. It reflected a long-term capital loss.

Q. What is that?

A. \$4,765.82.

Q. And as to the short-term transactions, what is the result there, sir?

A. A short-term capital loss of \$1,738.41.

Q. What is the total result of this capital gains schedule as far as the tax consequences are concerned?

A. Well, as far as tax purposes is concerned there is only \$1,000 deducted from ordinary income because of the limit of capital losses in any one year.

Q. And that is in line—that is the amount you have entered on line 8(e)?

A. That is correct.

Q. And the balance of the capital losses of the defendant is listed on line 8(g), is it not, sir?

A. That is correct.

[fol. 209] Q. And that is what figure?

A. \$3,161.32.

Q. And that is a capital loss carryover to the next year, is it not?

A. That's right.

Q. And that is applied against the defendant's transactions in 1952?

A. That's right.

Q. Mr. Amoruso, I show you Defendant's Exhibit G-4 in evidence, being pages 1, 2, 3 and 4 of the 1951 draft tax return, and I direct your attention, sir, to page 3 of that exhibit and to the column headed "Contributions." Do you find that, sir?

A. Yes.

Q. Whose writing follows that?

A. That is my writing.

Q. And the figures?

A. They are mine.

Q. Where did you get that information from?

A. I got this information from Dr. Palermo.

Q. Orally?

A. Yes.

.

Q. Under that are the words "Sales and Miscellaneous" in your writing?

A. Yes.

Q. Is that right?

A. Yes.

Q. And the amount \$65?

A. That is correct.

Q. Where did you get that information from?

A. I got that from Dr. Palermo.

Q. How?

A. Verbally.

Q. Orally or in writing?

A. Orally.

Q. Below that, sir, below the total of deductions, there are a number of figures for the computation of tax. Are those figures all in your writing?

A. Yes.

Q. Did you in fact compute the tax?

A. I did.

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Q. Will you look at Schedule C.

A. I don't have it here.

Q. I will give you the original which is Defendant's Exhibit I-4 in evidence. Is this Schedule C?

A. Yes.

Q. Is it in your writing?

A. It is.

[fol. 210] Q. Both the words and the figures?

A. Everything is in my writing except this writing here. As I said yesterday, it's not mine.

Q. You are referring to the words in the circle which say "Figures submitted"?

A. That's right.

Q. Is that right?

A. Yes.

Q. And then below that there are some initials?

A. Yes.

Q. Whose initials are they?

A. I don't know. They look like—

Mr. Newcomb: We cannot hear him.

Q. Can you speak up, please, so that everybody can hear you?

A. I don't know whose they are. I don't recognize this at all, this writing. All I wrote on here is the heading at the top and the figures in the columns.

Q. Now, sir, I want you to look closely at this Exhibit I-4. Can you see that these words "Figures submitted" have been written over some other words which are erased but not totally erased?

A. There was something there but I can't make it out.

Q. Now as to that something that was there, can you discern that the first two words of what was erased appear to be "All figures"?

A. No, I can't make that out.

Q. Do you recall whether or not you ever wrote a note there, sir, on Exhibit I-4, and I am referring now to the words that appear to be erased or partially erased?

A. No, I don't recall writing anything there.

Q. Do you recall whether you ever erased any note on Exhibit I-4?

A. No.

Q. Did you ever direct anyone to erase any note—

A. No.

Q. —on Exhibit I-4?

A. No.

Q. Now, looking at Schedule C, sir, at the top, Total received from business or profession, \$9,372. Do you find that figure?

A. Yes, I do.

[fol. 211] Q. Will you tell the Court and jury what your basis was for arriving at that?

A. A part of this figure is contained in the memorandum on the front of the return which is London Guarantee and Accident fees of \$1,291.84 included under Professional Fees in Schedule C. That amount plus the amount of information received from the Doctor verbally on the balance of his professional income comprise the \$9,372.

Q. You say the balance of income received by you and you said something about verbally?

A. That is correct.

Q. To whom was that given?

A. To me, in this case.

Q. I take it you meant again that was given orally?

A. Yes.

.

Q. Now, sir, I am going to show you these work papers for 1952, which are all portions of Defendant's Exhibits V-7, and the exhibits I now give you, Mr. Amoruso, are marked individually Defendant's Exhibit V-7-A, V-7-B, V-7-D, V-7-E, V-7-F and V-7-G.

I am going to show you Government's Exhibit 632 in evidence, being the photostat of the draft return for 1952 prepared by your firm, and I ask you if any of that return was prepared by you, sir?

A. Yes, part of it.

Q. Well, will you tell the Court and jury what parts?

.

Q. Anything else?

A. Schedule C is all in my handwriting.

Q. What is Schedule C, sir?

A. That is the profit or loss from business or profession; and the Schedule D, the line which reads "Various stocks"

231
showing a capital loss of \$716.50; and the line showing the capital loss carryover from 1951.

Q. Now, sir, looking at Schedule C, the defendant's professional income, what figure do you find there reported as the gross income, sir?

A. \$8,254.

[fol. 212] Q. And where did you get that figure?

A. (Continuing) The figure of \$8,254 as appears on Schedule C as gross receipts is partially derived from the London Accident & Guaranty fees of \$1,139.88, and the balance of the professional fees was received from Dr. Palermo verbally.

Q. Received by whom, sir?

A. Well, I don't remember whether I received this directly or Mr. Sanfilippo.

The Witness: I beg your pardon, this is a tax return—this information was received by me.

Q. Personally?

A. Yes.

Q. And how was it communicated to you by Dr. Palermo?

A. Verbally.

Q. Over the phone or in a face-to-face meeting, or what?

A. No, over the telephone.

Q. When, sir?

A. This must have been sometime in February of 1953.

Q. Now on Schedule C at the bottom there is a breakdown of expenses incurred by the defendant in connection with his profession in 1952, is there not, sir?

A. Yes.

Q. And you have said that all those words and figures in that schedule are in your writing?

A. That is right.

Q. Now where did you get that breakdown of expenses from?

A. I got this from the Doctor verbally.

Q. At the same time you got the income figure?

A. That is right.

Q. I direct your attention to the little words in the circle on Schedule C saying what appears to me to be "All figures est."

[fol. 213] Is that in your writing?

A. That is right.

Q. Now, does that mean that you estimated the figures on that return or that part of the return?

A. No.

Q. What does it mean?

A. I wrote those figures on what purely was an assumption that I thought the Doctor was estimating when he gave me the figures for the deductions.

Q. What caused you to make that assumption?

A. I just felt—I mean, as we were talking he asked me what had been deducted the previous year.

Q. He asked you that when, sir?

A. At the time we were getting the information from the tax return in early 1953.

Q. You mean in the course of a phone conversation?

A. Yes.

Q. Did you ask him at that time if he was estimating?

A. No, I didn't.

Q. Can you tell us, sir, looking at page 3 of Exhibit 632 where you obtained the information stated there about the defendant's contributions?

A. I got those from Dr. Palermo verbally.

Q. And the information concerning the interest expense stated there?

A. I would have to look at the papers for that. This is interest on secured loans, brokers and banks, \$14,208.38. I can't find the information—

A. (Continuing) I can't find the total recapitulation for the interest. There is only two items here from the brokers.

Q. Do you find anything in the work papers there about the bank interest?

A. No.

[fol. 214] Q. Then do you know, sir, whether or not you had any work paper or papers relating to the bank interest?

A. I don't remember.

Q. Do you know where you obtained the information pertaining to the defendant's bank interest in 1952?

A. I obtained it from the Doctor.

Q. How, sir?

A. Verbally.

Q. You personally?

A. Yes.

The Court: And by "verbally" you mean not in writing?

The Witness: No, sir.

Q. Mr. Amoruso, I show you Government's Exhibit 6 in evidence, what we have come to call the Steiner-Rouse form or card. When did you see that for the first time, do you remember?

A. At the time we were preparing the 1952 return.

Q. Who gave it to you, sir?

A. I believe Mr. Sanfilippo gave me this form.

Q. Had you ever seen it before the time when you were preparing the 1952 return?

A. No.

Q. Did you see it, in fact, when you were working on the 1951 return?

A. No.

Q. Now do you recall a time in 1954 when you delivered the work papers and original draft copies of the defendant's tax returns and other papers to him?

A. Yes.

Q. When and where did that take place, sir?

A. Sometime in April 1954.

Q. And where, sir?

A. I delivered these papers to the Doctor at his office.

Q. Which office?

A. On 86th Street.

Q. Is that 302 West 86th Street?

A. That is correct.

[fol. 215] Q. And when did you next see those work papers again, sir?

A. I didn't see those work papers again until early in 1957.

Q. Now the indictment was returned March 14, 1957. Was it before that or after that?

A. I think it was about a month before that.

Q. And did you see them then in the offices of the United States Attorney?

A. Yes.

Q. Now wasn't there a time in 1956 when you saw these work papers in the offices of Dwight, Royall?

A. Yes, but they weren't in my possession; they were in the possession of Dwight, Royall.

Q. Well, you did see them there, though, did you not?

A. Yes.

Q. And you did go over them there?

A. Yes.

Q. With some of the attorneys?

A. Yes.

Q. Would you tell the Court and jury who was present when you did that?

A. We had a conference with Mr. Wells and I believe Mr. Clark of Dwight, Royall and myself.

Q. Who else was present?

A. And I believe Mr. Frisch was present.

Q. Mr. Frisch of Dwight, Royall?

A. Yes.

Q. Was anyone else present?

A. That's all.

Q. Was your attorney present?

A. No, not at that time.

Q. Was Mr. Sanfilippo present?

A. No.

Mr. McHugh: May I have these five papers marked for identification as Government's Exhibit 635.

(Marked Government's Exhibit 635 for identification.)

[fol. 216] Q. Mr. Amoruso, I show you Government's Exhibit 635 for identification and I ask you if all those papers are in your writing?

A. (After examining) Yes, they are.

Q. What are they?

A. These are memorandums that I made hurriedly at that conference as to—

Q. What conference?

A. At the conference in Dwight, Royall's office, of the various tax returns, 1948 through 1952, of notations of what was in my handwriting and what wasn't, and where the figures were derived from, the best I could remember.

Mr. McHugh: I will offer that in evidence.

Mr. Newcomb: No objection.

(Government's Exhibit 635 for identification received in evidence.)

Q. Now, sir, when you worked on the defendant's tax returns for the years 1948, 1949, 1951 and 1952 did you have any information, either brokerage statements or any other, before you in the name of Rosina Palermo?

A. No.

Q. Did you have any information in those years before you in the name of Catherine Schultz or Catherine Brady?

A. No.

Q. Did you have any of that information before you in any of those years in the name Rose Palermo or Rose Giordano?

A. No.

Q. Did you ever, in fact, withhold any information that you had in your possession—

A. No.

Q. Let me finish the question, please—from the defendant's return that you prepared for the years 1948, 1949, 1951 and 1952?

A. No.

Q. Did you ever instruct anyone in your firm to do so?

A. No.

[fol. 217] Mr. Newcomb: Your Honor, the witness testified on his direct examination about Schedule C, being the profit or loss from business or profession in connection with the 1952 tax return; the original retained copy of

that is in evidence as Defendant's Exhibit P-5, and I propose to examine the witness about it; * * *

Cross examination.

By Mr. Newcomb:

Q. Mr. Amoruso, on your direct examination you testified, as I recall it, that you got the figure as to income from the Doctor.

Do you recall that you so testified?

A. Yes.

Q. Personally?

A. Yes.

Q. Over the telephone?

A. That is correct.

Q. Then Mr. McHugh called your attention to the words in the circle in the upper left-hand side about two or three inches from the top. Do you see those?

A. Yes.

Q. Am I correct that they read "All figures est"?

A. That is right.

Q. In your handwriting?

A. It is.

Q. And "est" indicates estimated?

A. That is right.

Q. And had you on earlier occasions in this case been concerned about the problem or the extent to which, if at all, you had used estimates in making up these returns?

A. I had not used any estimates in making up these returns.

Q. Had you prior to your testimony here today discussed with Mr. McHugh or anyone else representing the Government the meaning of those words "All figures estimated"?

A. Yes.

[fol. 218] Q. As I understand your testimony on direct, it was to the effect that you wrote those figures there after a conversation with the Doctor on the telephone in which you had gone over all of the expense figures except depreciation?

A. That is correct.

Q. And you told us that you got the impression that the Doctor was estimating?

A. That is correct.

Q. And that is the reason you wrote down the item "All figures estimated"?

A. That is right.

Q. The Government showed you some notes that you wrote out on Government's Exhibit 635, and I ask you whether, regardless of where or when you wrote them, you were examining at the time you wrote them the worksheets and retained copies of the defendant's return?

A. That is correct.

Q. You were going over those worksheets and the defendant's retained copies in order to ascertain where you personally appeared in those papers, is that right?

A. That is right.

Q. And did you do it thoughtfully?

A. Well, I did it hurriedly and to the best of my ability.

Q. Did you think it important when you were doing it?

A. Yes.

Q. I show you the page of Exhibit 635 relating to 1952 and ask you to read to the jury what you wrote at the top?

A. In the Schedule C?

Q. Yes.

A. "Income from business estimated figures based on previous year per client's instructions through ARS."

Q. What you wrote was not that you had a conversation with the Doctor but that you based the estimates on last year's figures per client's instructions through ARS?

A. That is not correct.

Q. You were in error when you wrote that?

A. When I wrote this it was purely an assumption, the [fol. 219] best that I could remember at the time, that these figures had been given to me this way. It was subsequently upon reflection and examining these returns more closely that I remembered and I recalled that I had had the conversation with the Doctor.

Q. Are you aware of the difference between a genuine recollection and a mere attempt to rationalize or reconstruct what could probably or what might have happened?

A. Yes.

Q. After you wrote Exhibit 635 did you ask Mr. Sanfilippo at any time prior to today about this writing in the circle on Exhibit P-5?

A. No.

Q. Did you talk to anyone about it other than the representatives of the Government?

A. No.

Q. Did the representatives of the Government call to your attention what you had written about this in Exhibit 635?

A. Yes.

Q. And when did that happen?

A. Well, at the discussions with the U. S. Attorney prior to the trial.

Q. About how long ago did this question come up?

A. About a month ago.

Q. Is it your understanding as you sit there and as you gave your testimony on direct that it would be highly improper for an accountant to make up his own estimates and put them in a tax return?

A. Yes.

Q. And did you have it in mind as you sit there now and as you are testifying on your direct examination that it was less improper if the client does the estimating?

A. I don't believe so.

.

Q. Mr. Amoruso, I show you what has been marked Defendant's Exhibit D-7 for identification and ask you if the figures on the bottom of that are in your writing?

A. Yes, they are.

[fol. 220] Q. Just a little bit earlier this morning you testified under oath that you got the interest figures for the 1952 return from the Doctor verbally?

A. That is correct.

Q. Do you recall that?

A. Yes.

Mr. Newcomb: I offer in evidence as Defendant's Exhibit D-7 the letter from the National City Bank to Dr. Palermo, dated January 2, 1953, setting forth the interest figure of

the bank for that year, the witness having identified the figures on the bottom as in his own handwriting.

Mr. McHugh: No objection, your Honor.

(Defendant's Exhibit D-7 for identification received in evidence.)

Q. Mr. Amoruso, I show you Exhibit D-7 in evidence and ask you to look at the figures in your own handwriting, and I ask you whether you now want to change your testimony as to where you got the interest figures from 1952?

A. Well, this letter obviously is a letter from the bank advising the Doctor as to the interest deductions, and I couldn't find this in my papers. As best I could remember, I said I got it from Dr. Palermo. Obviously this letter here shows the interest deductions of the bank for the year.

Q. Do you follow the procedure of telling this jury under oath that you got figures from the Doctor wherever you can't find anything in the worksheets showing you got it from some other source?

A. The best I can remember is whatever I had available in the worksheets is what I have on the tax return. Any additional information I needed I got from the Doctor verbally. In the absence of finding this in the papers I had to, as best I could remember, say that he had given it to me. This might have been sent to me later after he spoke to [fol. 221] me verbally, I don't remember.

Mr. Newcomb: Let us find out about that.

Q. Mr. Amoruso, remember, although I stand beside you, please keep your voice up. Now I hand you the original exhibits, V-7-F and V-7-G. According to the exhibits in evidence the amount reported for interest for the year was \$14,208.38?

A. That's correct.

Q. And what is the total that you find on Exhibit D-7 in your handwriting?

A. \$14,208.38.

Q. Do you see the figure \$2,930.80?

A. Yes, I do.

Q. Is this letter, Exhibit D-7, in your handwriting?

A. Yes.

Q. Let us look and see where that figure came from. Will you look at Exhibit V-7-F.

A. It comes from the analysis, from the Fox, O'Hara statement.

Q. And it is exactly the same figure, \$2,930.80?

A. That is correct.

Q. And then do you see the figure \$463.81 in your handwriting on this letter?

A. Yes.

Q. And would you look at Exhibit V-7-G and do you find that same figure there?

A. Yes, I do.

Q. In the letter the National City Bank says that the total interest was \$10,418.76. Do you find that written in your handwriting on D-7?

A. Yes.

Q. Are you now satisfied that you had D-7 in your possession and made your calculations on it at the time the 1952 return was filed?

A. Yes.

Q. I take it then that your suggestion a few moments ago that you might have done this later has now been taken care of, is that right?

A. When I said "later" it doesn't mean January 2, 1953. When I said "later" it might have been done in February, 1953.

[fol. 222] Q. It was not your intention when you made that suggestion to throw out the thought that these figures might have been put on there at some time subsequent to the filing of the return?

A. Absolutely not.

.

The Court: Do you say, Mr. Amoruso, that you might have put those figures on the bank's letter at a time after you had received them orally from the Doctor?

The Witness: Yes, your Honor. In other words, I had the figures on the brokers, your Honor, and I spoke to the Doctor, to get the balance of the interest, and he sent in this letter from the bank. The fact that it is dated January 2nd doesn't mean that I received it on January 2nd. I

probably may have received that letter a month later, at the time of the preparation of the return.

The Court: But you say that he gave you the figure over the telephone of the bank interest of \$10,418.76 and he later sent you this letter?

The Witness: That's what I remember, your Honor.

By Mr. Newcomb:

Q. Mr. Amoruso, did you not tell the jury this morning that you got the interest figures from the Doctor over the telephone?

A. For the bank, the interest figures are on there for the brokers also.

Q. You testified that you got the figures over the telephone from the Doctor personally, is that right?

A. That's right.

Q. You now tell the jury that you got the figures over the telephone from the Doctor first and later he sent you the letter; is that your testimony?

A. That's right.

[fol. 223] Q. The figure of \$14,208.38 was the final figure; is that not right?

A. That's correct.

Q. In order to arrive at it you had to get together the figures from the National City and the Corn Exchange and the two figures from the brokers?

A. That's correct.

Q. Are you telling us that the Doctor gave you over the telephone the figures for the Corn Exchange Bank?

A. I don't remember anything about from the Corn Exchange Bank.

Q. I am trying to find out about this conversation that you had with the Doctor over the phone.

A. All I am saying about the conversation from the Doctor he may have had the letter in front of him when he gave me the figure and then subsequently sent the letter in.

Q. Did he give you the figure for the Corn Exchange?

A. I don't remember anything about Corn Exchange.

Q. Am I correct that the only thing that you now remem-

ber about this conversation is that he gave you the figure from the National City Bank over the telephone?

A. That's correct.

• • • • •

Q. Mr. Amoruso, I show you Exhibit O-7-B in evidence, which is a worksheet relating to the Doctor's return for 1949—

A. It says 1948.

Mr. Newcomb: Pardon me. 1948.

Q. (Continuing) —which, as I recall it, you said was all in your own handwriting.

A. That is correct.

Q. And it shows dividends listed in a column totaling \$3,300.

Do you see that?

A. I have a total of \$3,230.

Q. Thank you. \$3,230.

Then do you see the figure "1390"?

A. Yes.

Q. Which is added in there in your own handwriting?

A. That is correct.

[fol. 224] Q. Now, you testified on direct examination that that is something that the Doctor gave you in one of these telephone conversations, is that right?

A. That is correct.

Q. Before you gave that testimony did you examine the file for 1948?

A. No.

Q. Was it shown to you by the United States Attorney or anyone?

A. You mean this sheet?

Q. No, the file for 1948, your firm's file.

A. You mean the working papers?

Q. The working papers and photostats of the retained copies.

A. Yes.

Q. When you gave that testimony were you aware of the fact that there was introduced in evidence here a memorandum in the handwriting of Mr. Sanfilippo with respect

to which Mr. Sanfilippo testified that the Doctor told him that his dividend income for 1948 was approximately \$12,000?

A. No, I didn't know that.

Q. Did the United States Attorney tell you about that testimony?

A. No.

Q. Did he show you the memorandum in the handwriting of Mr. Sanfilippo?

A. I don't remember seeing any memorandum.

Q. The 1948 return was prepared sometime in 1949?

A. That is right.

Q. That is nearly eight years ago, is it not?

A. That is correct.

Q. Do you have any recollection of this alleged conversation with Dr. Palermo?

A. No, except the fact that I know I received additional dividend information, that is all.

Q. Actually, is it not a fact that you have no genuine reconnection at all as to where that "1390" came from but are merely or have been merely reconstructing in your testimony about it?

A. I don't think so.

Q. You realize, of course, that your testimony is given under oath?

A. That is correct.

[fol. 225] Q. Did Mr. Sanfilippo tell you in connection with the 1948 return that the Doctor had told him, Mr. Sanfilippo, that the Doctor's dividend income was in the amount of approximately \$12,000?

A. I don't recall any conversation—

Q. Sir?

A. I don't recall any conversation with Sanfilippo.

Q. Well, if Mr. Sanfilippo had such a conversation and wrote such a memorandum, are you clear that you were totally unaware of it when you put that \$1,390 in there on that worksheet?

A. Yes.

Mr. Newcomb: * * * And I hand the witness the original of Exhibit U-7-D.

By Mr. Newcomb:

Q. Mr. Ameruso, on your direct testimony your attention was called to the figure in the lower portion of the exhibit listing the interest from banks for the last month where the figure reads "656.50 est."

Do you see that?

A. That is correct, yes.

Q. As I heard your testimony you said under oath that you got that figure verbally from the Doctor?

A. That is correct.

Q. Was that a mere reconstruction on your part or did you have a genuine, bona fide recollection that you got that figure from the Doctor?

A. Yes.

As I remember it, I only had the debit memos for eleven months, and there was one month missing.

As I recall, I asked the Doctor if the figure for the last month was approximately the same as the previous month. That is the best I remember it.

Q. So actually the Doctor did not give you the figure "656.50" at all, did he?

A. Yes, he did. That is what I remember getting from the Doctor on the phone.

[fol. 226] Q. Did the Doctor say to you on the telephone, "My interest at National City for December was 656.50"?

A. That is what I recall.

Q. Is that an honest recollection?

A. That is right.

Q. I show you what has been marked Exhibit J-8 for identification and ask you whether or not it has on it some figures in your handwriting which have been scratched out?

A. Yes.

Q. Would you look at it and tell the jury whether it does not refresh your recollection that you took the debit ticket for November and sat down and calculated yourself what would be the interest on a \$250,000 loan for the month of December?

A. That is right. But I gave this information to the Doctor first and then he told me that that was the figure.

Mr. Newcomb: I offer it in evidence.

(Defendant's Exhibit J-8 for identification received in evidence.)

Q. Underneath the "Debit account of" do you see the figure "0375"?

A. Yes.

Q. That represents the interest rate?

A. That's correct.

Q. And do you see under that figure "210000"?

A. Yes.

Q. That is the amount of the loan?

A. Yes.

Q. So what you were doing was that you multiplied the amount of the loan by the interest rate?

A. Correct.

Q. And then that will give you the total which will be a yearly total?

A. That's right.

Q. And that is down there, or it appears to be, isn't it?

A. Yes, it looks like it.

[fol. 227] Q. Then you divide by 12?

A. That's right.

Mr. Newcomb: Your Honor, may we give to the jury photostatic copies of Defendant's Exhibit W, which is the retained copy for the year 1949, but only the page relating to the medical income and expenses referred to by the witness in his direct testimony.

Q. As I recall your testimony, Mr. Amoruso, about the exhibit which is a portion of Defendant's Exhibit W, comprising Schedule C of the retained copy for the 1949 return, you testified that you got the figure of receipts \$9,581 from whom?

A. I believe that's the year there is an attached memorandum in Sanfilippo's writing.

Q. So that you got from Mr. Sanfilippo and not from the Doctor?

A. That's right.

Q. Then did Mr. Sanfilippo—and I show you Exhibit X—also tell you that the Doctor's expenses for the year were \$4,935?

A. Yes.

Q. If you included depreciation how much would you set forth on Schedule C as constituting the Doctor's expenses?

A. \$4,934.84.

Q. That is a difference of 16 cents, is that correct?

A. That's right.

Q. Have you ever in your accounting work changed a rounded figure so as to make it come out in pennies and make it look good?

A. I might have; I don't know offhand whether I did or not.

Q. That is what you did here, isn't it? Sanfilippo gave you \$4,935 and you wrote—

A. This figure—

Mr. Newcomb: May I finish my question, your Honor?
The Court: Yes.

[fol. 228] Q. You wrote on here \$670 depreciation?

A. Yes.

Q. Now follow me.

A. Yes.

Q. And then you came up with a figure of \$4,265 and then you changed the latter to make it look good?

A. I wouldn't say that I changed that because those figures are not mine—the "484" at the end are not mine.

Q. Well, you told this jury under oath yesterday that you got those figures from the Doctor. Now, did you or didn't you?

A. Subsequent to my receiving the breakdown of these figures, because Sanfilippo's figure is only in total, from a preliminary conference with the Doctor, to get his total income and expenses. This is the breakdown that I got. Now there might have been a small difference in the figures, with someone else going over this. I may have made an error in addition. So that's why I say the figure at the bottom of the return is not mine. It was changed. I might

have made an error. I don't recall. That's 1949. As to why somebody changed these figures down here—

Q. When for the first time did you hear that what was recorded in Mr. Sanfilippo's memorandum was a "preliminary conference" or information given at a "preliminary conference"?

A. I don't remember the exact date. I mean, I can remember that Sanfilippo as a matter of policy used to meet with the Doctor preliminary to making up the return.

Q. Mr. Sanfilippo or someone else told you, did they not, within the last week, about this business of a "preliminary conference" with the Doctor; isn't that so?

A. That is not so.

Q. Are you telling the jury now that all these various memoranda from Mr. Sanfilippo that are in the file reflected, as you understood it, "preliminary conferences"?

A. That's right.

Q. I show you Exhibit X and I call your attention to the figure 5131, which is listed as dividends earned, and [fol. 229] I ask you when you prepared the return if you made any effort to ascertain whether the amount stated in this memorandum of a preliminary conference was the accurate one?

A. No, I didn't go any further; I took this figure and put it on the tax return.

Q. Am I correct then that what happened that year was you simply followed this memorandum and wrote \$5131 on the return without further inquiry?

A. That's correct.

Q. Going back to Schedule C for 1949, it is obvious, is it not, that the figure, the last figure in the total figure on line 19 reading "Other expenses"—the total figure now reading "\$4264.84" was changed from something else; isn't that right?

A. That's correct.

Q. And you say you had nothing to do with that change?

A. No, I don't recall having anything to do with the change.

Q. Do you know who did make the change?

A. No, I don't.

Q. You were the fellow that was supposed to have gotten the figures at the bottom of the page from the Doctor?

A. That's right.

Q. Then whoever changed it was putting down something that you hadn't gotten from the Doctor, isn't that right?

A. No, that's not true. I said I might have made an error in addition and they corrected it at the time they rechecked my arithmetic or my computations.

Q. Isn't it true, Mr. Amoruso, what happened was this: that you took the figure \$5935 from Mr. Sanfilippo's memorandum and you looked at the last year's return and you juggled the expense figures so as to fit the total appearing on Exhibit X?

A. No, that is not true.

[fol. 230] By Mr. Newcomb:

Q. Before we go any further, I think I better ask you about how many telephone conversations did you have each year with the Doctor?

Mr. McHugh: May we have the period fixed, Mr. Newcomb?

Mr. Newcomb: For the tax year 1952.

The Witness: 1952?

Mr. Newcomb: That is right.

A. I had maybe just one conversation or two with the Doctor at most.

Q. Over what period of time?

A. Well, during the course of the tax season, which runs from January 1st—in those years—to March 15th.

Q. I take it you and your partner have a different concept of the tax season, do you?

A. Well, the generally known time of the tax season runs from January 1st to March 15th. But as every practitioner knows, the bulk of your work is concentrated toward the latter part of the tax season, which could be anywhere from the second or third week in February to March 15th.

Q. Now with respect to the Doctor's returns, in the

normal course in your office were they prepared early or late in relation to filing day, March 15?

A. Well, I would say right in the same time as all the other taxpayers, somewhere about the middle of February, the latter part of February.

Q. Well, on the times that you worked on them, do you have any genuine recollection as to when, relatively, they were worked on in relation to the March 15th date?

A. No.

The Court: Before we leave Exhibit W—have you got Exhibit W before you?

[fol. 231] By the Court:

Q. Do I understand you correctly, Mr. Amoruso, that you got the detailed figures in this schedule at the bottom of that paper, called Schedule G?

A. Yes.

Q. From the Doctor?

A. Yes.

Q. And those are all in your handwriting?

A. Yes.

Q. Can you read me the last item before you get to the total? I can't read that.

A. That is Sundries, your Honor.

Q. Sundries?

A. Yes.

Q. And that started out, didn't it, at \$247.90 but somebody changed it to \$247.74?

A. I guess so, your Honor.

Q. And that would account for the difference between \$4,934.84 and \$4,935.

A. Yes, your Honor.

Q. But you don't know who did it or why?

A. No, your Honor. The total figure is not mine. Someone corrected my work.

Q. It must have been someone who thought that you had misunderstood what the Doctor told you, is that right?

A. That could be, your Honor.

Q. And your total must have been \$4,265?

A. Yes, sir, on these figures, your Honor.

Q. Which would have made the total of expenses \$4,935?

A. Yes, sir.

Cross examination (Continued).

By Mr. Newcomb:

Q. Mr. Amoruso, I show you a photostat of Exhibit I-4, which is Schedule C annexed to the 1951 return and which relates to the Doctor's income, profit or loss from business or profession. As I understand your testimony, in this instance you got the medical income from the Doctor and not from Mr. Sanfilippo?

A. That is correct.

Q. And is it your testimony that for this year 1951 you also got the itemized list of expenses from the Doctor?

A. That is correct.

[fol. 232] Q. And I show you Exhibit L-4 in evidence, which is a pink slip, and ask you if it is all in your handwriting?

A. Yes.

Q. Does Exhibit L-4 record the figures given to you by the Doctor over the telephone?

A. That is correct.

Q. And I take it you are entirely clear that you got these exact figures from the Doctor over the telephone?

A. That is what I recall.

Q. About these items, referring to the figures set forth in Exhibit L-4?

A. Yes.

Q. Did you have one conversation with the Doctor about these figures, the expenses in 1951?

A. I don't remember whether it was one or two or several.

Q. Are you suggesting to the jury that you got these figures from him over the telephone once and called him back and went over them again?

A. I might have; I don't remember how many times I spoke to him.

Q. Did you make any other memorandum except Exhibit L-4?

A. Not that I can recall.

Q. Did the Doctor give you depreciation figures over the telephone?

A. No, that is picked up from year to year from the previous schedule.

Q. Obviously he was not in a position to do anything like that?

A. That's correct.

Q. So your testimony, I take it, then, is that what he gave you were the depreciation figures exclusive of depreciation—

A. You mean—

Q. Pardon me, I withdraw the question. I take it then that your testimony is that what he gave you were the expense figures exclusive of depreciation?

A. That's right.

Q. When you had this conversation with him about these expense figures for 1951, did you at that time get the idea or the impression that the Doctor was estimating?

A. No, not that I can recall.

[fol. 233] Q. Look at that the exhibit again, if you will, and I point out to you that in the same place on this schedule for 1951 as appears on the same schedule for 1952 and also circled, there is something about what type of figures there are in this return.

A. It says "Figures submitted."

Q. That's right, but obviously somebody erased what was written there originally?

A. I have no recollection of that.

Q. Don't you remember on your direct examination that you and Mr. McHugh looked at that and you saw something had been erased?

A. Well, I couldn't read what was erased. I can't tell what was there.

Q. Were you able when Mr. McHugh was examining you to make out a portion of it?

A. No, I just couldn't make out anything underneath these figures.

Q. Is it not entirely probable that what you did on the

1951 schedule was that you wrote "All figures est"—for estimated—just as you did in the 1952 return?

A. I don't recall anything like that, Mr. Newcomb.

Q. Do you deny that that happened?

A. I don't recall doing it.

Q. I am entitled to know whether you deny it.

A. I didn't write anything on that.

Q. Your testimony is then that whatever was under these words which now appear on Schedule C for the year 1951 you did not write?

A. I can't see anything there. I can't tell what's underneath that.

A. I can't discern what is underneath this writing of "Figures submitted," so I can't say whether I wrote it or not, if there is anything there at all.

Q. Did you have any means of checking the Doctor's medical income?

A. No.

Q. I take it if you had more than one conversation with him about medical matters, it related—the second [fol. 234] conversation—related to expenses only, is that right?

A. I don't recall what the conversations would entail the first time or the second time. I couldn't say specifically whether it was the first or the second which was about income or expenses specifically.

Q. Do you remember changing the amount of the income?

A. Which return?

Q. The 1951 return?

A. No.

Q. Well, let us look at Exhibit I-4. Originally the income was written as \$8,372, is that right?

A. It could have been an "8", yes.

Q. And then where the figure is repeated in line 10, that was originally written "8372"; right?

A. Yes.

Q. And then after the expenses were deducted the net was written "3986.72"?

A. That is right.

Q. Now, when you wrote that "3986.72," it was based upon the final completed figures as to depreciation and all of the deductions?

A. That is correct.

Q. And then someone after that went back and added a thousand dollars?

A. Well—

Q. Isn't that correct?

A. That is right.

Q. I show you Exhibit 2 in evidence, which is the original 1951 return, and ask you if that is your signature in the lower lefthand side?

A. Yes, it is.

Q. And did you declare by your signature under the penalties of perjury that that return, including any accompanying schedules and statements, had been examined by you and to the best of your knowledge and belief was a true, correct and complete return?

A. That is correct, I did.

Q. To the best of your knowledge, information and belief at the time was it a true return?

A. Yes.

Q. Had you read it?

A. Yes.

[fol. 235] Q. Was it correct?

A. Yes.

Q. Was it complete?

A. Yes.

Q. By the time that you certified that return were you satisfied that your firm had been supplied with documents, data and information sufficient to justify your certification?

A. Yes.

Q. You were thoroughly satisfied at that time, were you not—

A. Yes.

Q. (Continuing) —that there were no documents, records or information necessary to prepare a complete and accurate return which had not been supplied to you?

A. That is right.

Q. Is that right?

A. That is correct.

Q. Did you with respect to that return tell the Doctor at any time that your firm did not have adequate and complete information upon which to prepare the return?

A. No.

Q. Did you tell the Doctor that the return was incomplete in any respect?

A. Not that I can recall.

Q. Incorrect in any respect?

A. No.

Q. Improper in any respect?

A. No.

Q. Did you go over the final figures in that return with the Doctor at any time prior to when it was filed?

A. No.

Q. That return was signed in blank by the Doctor, was it not?

A. This was the one that I recall was signed in blank, yes.

Q. And he left it with your firm before he went South with the Giants?

A. I believe so.

Q. And it was prepared after he left; is that not correct?

A. Well, when you say prepared, you mean the mechanical preparation of the return; but all the figures had been accumulated prior to his departure.

Q. Your statement is that all of the figures had been accumulated, analyzed, prepared and placed in final form prior to the time the Doctor left; is that correct?

A. That is correct.

[fol. 236] Q. Do you have the original return before you? I believe it is Exhibit 2?

A. Yes.

Q. Is it your testimony that prior to the time the Doctor left to go South with the Giants that spring, referring to the tax return for 1951, and therefore to the spring of

1952, the figure appearing on the first page relating to dividends and in the amount of \$21,628.49 had already been analyzed, prepared, calculated and arrived at in exactly that amount?

A. Well, that figure that you see on the first page is a cumulative total figure from all the items on the inside. It is not just dividends.

Q. Had it been calculated in its final amount before the Doctor left?

A. As far as I can remember, yes.

Q. Will you look at the top of page 2. There is listed the item for dividends; do you see that?

A. Yes.

Q. \$13,575.73?

A. Correct.

Q. Is it your testimony under oath that that figure had been analyzed, prepared and arrived at for exactly that amount prior to the Doctor's departure for the South?

A. Yes.

* * * * *

Q. And to save time, would you look at the return very carefully, and I will ask you a comprehensive question, and I would like you to take as much time as you need to examine each of the figures with care, and tell us whether each of the figures appearing in that final return had been analyzed, calculated and arrived at in exactly that amount prior to the time when the Doctor went South in 1952 on spring training?

A. When I say that all the figures had been prepared, it doesn't necessarily say that they were on the tax return. I say the information was accumulated and probably was in our working papers waiting to be put on the tax return. The actual preparation of the tax return itself may have occurred subsequent to the Doctor's leaving. That I can't say whether it was or not—

[fol. 237] Q. Well—

A. But I know that all the information had been accumulated previous to his departure.

Q. I thought my questions were clear, but let us go back to the details. I am not asking you whether this

particular piece of paper, the original return, had been typed as yet; I am asking you whether the final figures as to dividends, expenses, income, rent, royalties and charities, whether the work on them had all been completed by the time the Doctor left for the South?

A. Yes, as best as I can remember.

Q. Are you in doubt about it?

A. No, not in doubt.

Q. If so, tell us.

A. No; I recall that we had prepared everything prior to his departure but that he had left us this signed return, so that was to fill it in when we had a chance.

Q. Prior to the filing date of the 1951 return did you ever speak to the defendant in person, face to face, about the return?

A. No.

Q. Or anything relating to it?

A. No.

Q. How many telephone conversations would you say you had with the defendant with respect to this return?

A. Oh, I don't know, offhand maybe one or two. I don't recall how many.

Q. Over what period of time were they spaced?

A. I don't recall.

Q. What is your recollection as to the amount of time spent by you personally on the 1951 return of the Doctor?

A. Well, I would say maybe two or three days.

Q. Full-time?

A. Yes, most of the day.

Q. Am I correct that your own work on this return may have extended over a period of three days?

A. Yes.

Q. Will you say that the period of time that you were working on this return was certainly not less than two days?

A. I don't think so.

Q. Sir?

A. I don't think so.

[fol. 238] Q. You think it was more than that?

A. Yes.

Q. So we can agree at least three?

A. Yes.

Q. The Doctor was related to Mr. Sanfilippo at the time, was he not?

A. Yes.

Q. You were not related to the Doctor in any way?

A. I am not.

Q. As a matter of fact, you felt that this account was an unprofitable one from the firm's standpoint, did you not?

A. Well, the fees weren't big—no, it wasn't profitable.

Q. And there were occasions when in the hearing of other employees of the firm you were somewhat outspoken on that subject, were you not?

A. It's possible.

Q. Do you remember saying on occasion words to the effect that if Sanfilippo didn't have so many of his relatives we might be able to make some money around your firm?

A. It is possible.

Q. In the normal course, am I correct that the dealings between your firm and the Doctor were handled by the senior partner, Mr. Sanfilippo?

A. That's correct.

Q. And you got into the dealings with the Doctor, so to speak, only when Mr. Sanfilippo was not available?

A. That's correct.

Q. Would you be kind enough to take the 1951 return and use it to refresh your recollection and enumerate for us not the details but the subject matters discussed over the telephone by you with the Doctor?

A. Well, I believe that, as I stated before, I would ask him for the—

Mr. Newcomb: Your Honor, that was not my question. He started out with "I believe," and I move to strike the answer.

The Court: Yes.

Q. Mr. Amoruso, tell us not what you believe but what if anything you actually recollect, and enumerate without [fol. 239] details for us, please, the subject matters discussed by you with the Doctor over the telephone with respect to the 1951 return.

A. Well, they would be the professional income—

Mr. Newcomb: Once again, I think it is a habit of speech, your Honor, but we would have a bad record—

The Court: Say what it actually was and not what would be.

A. Well, we discussed the professional income and expenses, the dividends and the other deductions.

Q. What other deductions, by categories?

A. Contributions and the interest and the miscellaneous taxes.

Q. Anything else?

A. All the other items on the return, I believe, were information from the working papers.

Q. I am sorry, but—

A. The others are from information contained in the working papers. I can't say whether any capital gains were discussed unless I see my schedules, if I need—

Q. We will come to that later. We will come to the capital gains. Is there anything else that you can think of where we need to look at the working papers?

A. No, that's all I can remember.

Mr. Newcomb: May I have the witness's testimony given on June 14, 1955 on his examination under oath by the agent?

May I have this marked, may it please the Court, Defendant's Exhibit K-8 for identification, being the testimony of the witness on June 14, 1955?

[fol. 240] Q. I show you Defendant's Exhibit K-8 for identification and ask you if it bears your signature on page 14 thereof?

A. Yes.

Q. And does it constitute your testimony given to the special agents under oath on June 14, 1955?

A. Yes.

Q. And was a copy of it submitted to and read by you?

A. Yes.

Q. Did you then on August 24, 1956, sign and swear to it?

A. That's right.

Q. Had you been requested by the agents to sign and swear to it at some earlier time?

A. No.

Q. Did you after your testimony of June 14, 1955, examine any of the worksheets?

A. No, not until I saw them in Dwight, Royall's office at the first conference in late 1956 with Mr. Wells and Mr. Clark.

Q. Was that before or after you had signed and sworn to your testimony, which you will observe occurred on August 24, 1956?

A. I believe that conference took place subsequent to my signing this form.

Q. That is, you signed that exhibit K-8 prior to the time you had this conference with Dwight, Royall at which you say you prepared those notes?

A. That is correct.

Q. So that we get our sequence straight, you gave testimony on June 14, 1955, as appears in Exhibit K-8?

A. That is correct.

Q. The next step in the sequence I am dealing with was you signed the testimony and swore to it, is that right?

A. Yes.

Q. And the next thing that happened in the sequence was the conference with Dwight, Royall at 100 Broadway at which you say you prepared your notes?

A. That is correct.

[fol. 241] Q. The notes to which you refer are the five pages which comprise Exhibit 635 in evidence, is that right?

A. That is correct.

Q. I gather that you have read your testimony of June 14th?

A. Yes.

Q. And you read it in preparation for your testifying here?

A. Yes, sir; I have a copy.

Q. Correct?

A. Yes, sir.

Q. And knowing you were going to testify, you naturally read what you had said on a previous occasion?

A. That is correct.

Q. And you also read Exhibit 635?

A. Yes.

Q. In preparation for your testimony here?

A. Yes.

Q. And I take it you are entirely clear in your mind that you did not swear to Exhibit K-8 at any time after you had prepared those notes, Exhibit 635?

A. No; I said that I signed that prior to the meeting at Dwight, Royall.

Q. That is my point.

A. That is correct.

Q. As you sit there you know, do you not, that you cannot reconcile the notes, Exhibit 635, with the testimony, Exhibit K-8?

A. That is correct.

Q. I am sorry, I thought I had it clear, but it is suggested that perhaps I did not.

Did you or did you not swear to this testimony, Exhibit K-8, after you had prepared these notes, Exhibit 635?

A. My recollection is that I signed that first, and then the meeting with Dwight, Royall was later, about a month or two, at their office; I think it was the Fall, because it was cold. I don't remember any other meeting.

Q. Now returning to the certification of Exhibit 2, the original return for 1951, I take it that you did not tell the Doctor prior to the filing of that return that brokerage accounts were missing that you had to have?

A. I don't recall anything of that nature.

[fol. 242] Q. You did not tell him, I take it, that you needed any bank accounts or bank statements that you did not already have?

A. No.

Q. To shorten it, is it correct that you did not tell the Doctor prior to the filing of that return that there was any missing records which you needed?

A. No, I did not.

Q. Once and for all, did you in comparing the Doctor's tax return at any time use figures which were estimated by you?

A. No.

Mr. Newcomb: May I have the Court's permission to continue in the customary manner and provide the jury with copies of Defendant's Exhibit U-7-C? I am going into the worksheets for 1951, and Exhibit U-7-C is the 14-column sheet relating to stock transactions in the Fox, O'Hara margin account. May we proceed in that manner, your Honor?

The Court: Yes.

Q. Mr. Amoruso, Exhibit U-7-C is the worksheet designed for calculating capital gains?

A. That's correct.

Q. Do you know in whose handwriting the heading on the page is, "A. M. Palermo Stock Transactions, Fox, O'Hara"?

A. No, I don't.

Q. The words "margin account" at the top of the page is in your handwriting?

A. Yes.

Q. Did you supervise the setting up, processing and preparation of this worksheet?

A. Yes.

Q. Do you observe at the top the first column on the very left that you set up "Amount of Shares"? Do you see that?

A. Yes.

Q. Then there is the word "Name" meaning the stock, is that right?

A. Yes.

Q. Then do you see "Held as of 1-1-51"?

A. Correct.

[fol. 243] Q. What was the purpose of that column?

A. Well, that column is to pick up any information that we had of securities that were held at the beginning of

the year, which would be taken off the 1950 schedule; in other words, the carryover from whatever was left over at the end of 1950.

Q. Did that carryover come from the margin account?

A. Yes. I have similar sheets in the 1950 papers; that could be the only place where the figures could be derived.

Q. And that was your practice, to set up one year's papers on the basis of the papers in the file from the prior year.

A. The opening figures, yes.

Q. When you qualified your answer, I think perhaps unintentionally—

A. I said the opening figures are set up from the closing figures on the previous year's schedule.

Q. But what I am trying to get at is this: in working on this account, to prepare for 1951, you go to the 1950 return?

A. That's right.

Q. And the working papers?

A. The working papers, that's right.

Q. Do you observe that under the column "Held at 1-1-51," all of the dates of acquisition are in 1950?

A. That is correct.

Q. A margin account runs continuously, does it not?

A. So I understand, yes.

Q. If you want an inventory of stocks held at 1-1-51 in a margin account you have to look at the balance of the long position in the account, do you not?

A. Yes.

Q. I show you Government's Exhibit 107 in evidence and I suggest that you use that one. In the margin account of Fox, O'Hara as of 1-1-51, the defendant was long 4300 shares of the stock of RCA, was he not?

A. Yes.

Q. Do you see that stock anywheres in this worksheet?

A. I see 200 shares acquired on April 28, 1950.

Q. Do you see the other 4100 shares anywheres?

A. No.

[fol. 244] Q. When you open the inventory then, it starts off with a great, big hole in it, does it not?

A. That's correct.

Q. You folks had the margin account for 1950, didn't you?

A. I wouldn't recall that. I didn't work on 1950.

Q. Well, let's see. Without bothering to get the exhibits, V-7, the exhibit you had before you, your man did not get that inventory out of his head, did he?

A. As I stated before, whatever broker's statements were submitted to us in 1950, these figures would be extracted from the brokers' statements.

Q. I just pointed out to you that they were not complete, your own figure that you started out with, isn't that right?

A. That is correct.

Q. Actually, the long position which should have been accounted for in this schedule, U-7-C, is the long position in the margin account at the beginning of the year, is that right?

A. That is right.

Q. I take it then that your firm made an error, did it not, an accounting error at the very outset of your calculations with respect to capital gains for the year 1951?

A. I wouldn't say that. Our engagement was merely to take the dividend income from the broker's statements that were submitted and to extract whatever capital transactions appeared thereon. We have no way of tying in the figures in the long position with what we had on our sheets. This sheet may not have been available to us at the time. I don't know that.

Q. I take it that is the only explanation you have to offer?

A. That is correct.

Q. My attention has been called to the fact that on U-7 you have some sales recorded for January. Look at those, Electric Autolite, January 25, 1951.

A. That is correct.

Q. Where did that come from?

A. It came from this statement.

[fol. 245] Q. So you did have the first page of the statement?

A. Right.

Q. Is that right?

A. That is right.

Q. Going back to how this was made up, your clerk, whoever he or she was, simply took last year's worksheets based on the 1950 margin account and took the purchases recorded therein and eliminated the sales and set up that list of securities listed under the heading "Held in 1-1-51"?

A. That is right.

Q. Then this same clerk set up on this sheet under the heading "Purchases 1951" the purchases set forth on U-7-C under that column beginning with Electric Autolite in the fifth box under date of January 29, 1951, is that right?

A. That is correct.

Q. Are you the one who told your clerk to do that, to follow this procedure?

A. (No answer.)

Q. Perhaps I can help you. Is it not more likely that what actually happened was that your clerk simply went to the file of the year before, got out the forms and set up or tried to set up the same type of information?

A. It is likely.

Q. I mean, that was pretty much the way you operated in your firm?

A. Yes.

Q. And then when the clerk, so to speak, had exhausted his or her ingenuity and experience, then you stepped in?

A. That is right. I picked this up at the time of preparing the return.

Q. Did you check back, Mr. Amoruso, to see whether your clerk had correctly transcribed the information from the Brokerage account?

A. No, I don't believe so.

Q. Is it not possible that you yourself failed to observe the fact that the inventory of stocks listed for the margin account as being held of 1-1-51 was not complete?

A. That is possible.

[fol. 246] Q. You were under some pressure at the time, I take it; pressure of other business, I mean?

A. That is true.

Q. I believe your partner told us that your firm prepared between five hundred and a thousand returns in the tax season?

A. That is correct.

Q. And you had to certify—either you or he had to certify them all?

A. That is correct.

Q. Now under the sales column we again, I think, observe the handwriting of your clerk in some of the entries?

A. Yes.

Q. And by looking at this schedule can we not see that your clerk in this instance took such sales as he or she was able to observe from the margin account?

A. Yes.

Q. And then when he or she exhausted his or her intelligence and ingenuity, it came to you?

A. That is right.

* * * * *

Q. Now it is apparent, is it not, that in following this procedure you came up against a problem or a snag. Look at the bottom. Your clerk wrote over on the sales side 1-1-51 and the number of shares was 200. I am talking about the 36th line from the top.

A. Yes.

Q. And then your clerk wrote in the sales, disposed of, how much, 400, is that right?

A. That's right.

Q. And identified the stock, is that right?

A. That's right.

Q. But the clerk could not find where that stock had been acquired or when?

A. That's right.

Q. Looking at the lefthand side you see 200 Stewart-Warner in this line. Do you see that?

A. Yes.

Q. And then there is a question mark. Do you see that?

A. Yes.

Q. Whose question marks are those?

A. Those are mine.

[fol. 247] Q. So when you came along you had a question mark as to what to do with this stock, this sale, is that right?

A. That's right.

Q. And then you wrote "1942"?

A. That's right.

Q. And you wrote "3600" as the cost?

A. Right.

Q. Now, of course, you knew that that stock, the cost of that stock, was not exactly \$3600?

A. Well, no, I took the quotation that the Doctor had given me at 18.

Q. And your statement is that you called the Doctor?

A. That's right.

Q. You say you called the Doctor?

A. Yes.

Q. What did you say to the Doctor?

A. I said that I didn't have any costs against these items which appear in sales. I said, "Please furnish me with the costs and the date of acquisition," which he did, giving me this figure of 18.

Q. And how long was this conversation?

A. Oh, I don't know, it couldn't have been more than five or ten minutes to get this information from him.

Q. And he snapped it right off for you, right out of his head, is that right?

A. That is the information he gave me. He seemed to know what the costs were and the dates.

Q. And he snapped it right off, that that particular stock he bought in 1942 for \$18 a share?

A. Correct.

Q. Ten years before the date you were talking about?

A. That's right.

.

Q. So if you were doing it properly from an accounting standpoint you would have to ascertain what was the earliest purchase of Stewart-Warner stock made by the Doctor, wouldn't you?

A. Well, that's not our engagement, Mr. Newcomb. Our engagement was to reflect the figures as submitted by the [fol. 248] Doctor, and this is information derived by me from him. I didn't have neither the time nor the opportunity to find out what was the earliest acquisition at that time.

Q. You were aware, of course, if you didn't do that that you might be giving an entirely erroneous cost in this tax return; isn't that right?

A. That's true. That's true.

Q. Stocks go up and down?

A. That's true.

Q. Did you say anything to the Doctor in this telephone conversation—

A. What is that?

Q. Did you say anything to the Doctor or he to you in this telephone conversation about long term and short term and first-in and first-out?

A. No.

Q. What did you ask him?

A. As I said before, I asked him the cost and the date of acquisition of this stock, Stewart-Warner, that was sold in January of 1951. Other than that there was no conversation.

Q. He was long 600 shares of Stewart-Warner in the margin account at the beginning of the year. Did you ask, "Which of those 600, Doc, did you sell"?

A. No, I didn't.

Q. Your statement is that—by the way, you have in mind that you are testifying under oath?

A. That is correct.

Q. Your testimony now is that you clearly remember nearly six years ago calling the Doctor on the telephone and asking him when he bought these 200 shares of Stewart-Warner which shows up on your worksheets?

A. That's the best of my recollection.

Q. Well, do you have any such recollection?

A. I do.

Q. The next one is 100 shares? The same thing?

A. That's correct.

Q. The same conversation?

A. That's correct.

Q. You have a clear and actual recollection of it?

A. Yes.

Q. You called him up and said what?

A. The conversation which took place with reference to [fol. 249] these five security transactions at which I couldn't

derive a cost from my sheets, and the Doctor gave me the quotation on the cost and on the date of acquisition.

Q. Then we come to 100 Motor Products 1943. Do you see that one?

A. Yes.

Q. The same thing?

A. That's what he told me and that's what I put on the sheet.

Q. What price did he give you?

A. Motor Products 24.5.

Q. Well, the stock market figure doesn't tell you 24.5, it tells you 24½.

A. Well, that's what it means.

Q. And you put it down this way, indicating one-half?

A. That's right.

Q. Then do you see one for 51 shares of Thermoid?

A. Yes.

Q. He told you again that he remembered that he bought 51 shares of Thermoid in 1945 for \$867, is that right?

A. He told me at 17.

Q. Pardon me?

A. Right next to that—

Q. You mean at \$17?

A. That's right.

Q. Of course, Doc didn't say anything about a stock dividend in relation to Thermoid, did he?

A. No.

Q. So your testimony to the jury is that you called him up and you asked him to tell you the price of these 51 shares of Thermoid which had been sold in his account on a given day and he snapped it right off to you that he bought those in 1945 for \$17 a share?

A. That is correct.

Q. And now we come to a slightly different one, Ever-sharp. Do you see that one?

A. Yes.

Q. Well, look at it and study it a while and then tell us what was the conversation between you and Doc about that one?

A. The same as the others, 100 shares of Eversharp, cost at $12\frac{3}{4}$, acquired in 1950.

Q. What day?

A. The figure of 9/14 is not my writing. That was inserted later by somebody else.

[fol. 250] Q. Who?

A. I have no idea.

Q. Do you know whose handwriting that is?

A. No.

Q. Your testimony under oath is that it is not yours?

A. Absolutely. This "9/14" is not mine.

Q. The 9/14 means September 14, is that right?

A. That's right.

Q. In whose handwriting is the "1002.50"?

A. I don't know; it's not mine.

Q. In whose handwriting is the "272.50" on the bottom?

A. I don't know.

Q. I take it that you do not now say that the Doctor gave you the date of September 14, 1950?

A. The Doctor gave me 1950, that's all. This is a correction made at a later date, subsequent to the—subsequent to my working on this schedule. That means that maybe later they found that it was not the correct amount or the correct quotation and this should be the correct amount rather than what I had.

Q. And when you said "this" you were pointing to "1002.50"?

A. That's right. In other words, this is probably the correct cost as determined later.

Q. When Doc told you that he bought that stock in 1950, did you say to Doc in substance, "Well, you don't need to worry about that; we have your account"?

A. No, I didn't have any conversation of that nature.

Q. You did have the account, didn't you?

A. What is that?

Q. You did have the account for 1950, did you not?

A. We had whatever was given to us for 1950. Whatever appeared on the sheets and was held at the end of 1950 is reflected here.

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Q. Looking at Exhibit U-7-B, will you tell us, if you would be so kind, in what order did you do this work? I see, and I call your attention to, three separate blocks of [fol. 251] transactions. There is a block in the upper left-hand consisting of nine items, there is a block in the center upper right relating to the same item, and there is a big long block relating to or comprising some 35 items centered under the word "Purchases." In what order did you do those three different blocks?

A. This was worked on the basis of chronological order from the figures in the cash account of Fox, O'Hara. You will notice under the word "Sales", you will see date, shares and amount. The date of all the sales was January 25, 1951. I listed these sales down and put the name of the security on the left hand side. I listed the sales first. Then I went to the purchases and picked up all the purchases that appeared from January 26, 1951 on by name of security.

Q. So that the record may be clear, are you now referring to the solid block of some 35 in a row?

A. That is correct.

Q. Next?

A. Then I had no costs against these securities that were sold on the cash account statement. So I asked the Doctor to give me again the dates and the amounts of these securities, when he acquired them and the dates.

Q. And this is all the same conversation?

A. That's right.

Q. And he snapped them all off to you just like that in one conversation, is that right?

A. That's correct.

Q. Now look at Western Union, the very top one. Do you see the figures "34.2"?

A. Yes.

Q. Do you remember that Mr. McHugh read that as "34½" and I rose to point out that it was "34.2" and I believe you agreed with me; do you remember?

A. That's right.

Q. Doc was giving you stock market quotations of prices, I take it, was he not?

A. That's right.

Q. Did you ever hear of a stock trader who gave a quotation in fifths?

A. No.

[fol. 252] Q. Quotations are in eighths?

A. That is correct.

Q. It is an accountant that expresses thing in decimals, isn't it?

A. Well, anyone who deals with figures can express things in decimals, but these are the figures that the Doctor gave me.

Q. Doc gave you that and said that he bought that one on February 1, 1950 and paid thirty-four and two-tenths per cent, rather, thirty-four and two-tenths dollars; is that your testimony?

A. It is.

Q. He rattled off all of these figures in this one conversation, is that right?

A. That's right.

Q. Had you heard over the years in your office and had you yourself frequently expressed yourself in some colorful language about the Doctor's failure to keep records?

A. Yes.

Q. Actually in your observation the Doctor had no comprehensive records of his stock transactions; isn't that right?

A. That is correct.

Q. Looking at these transactions, Mr. Amoruso, you say that you asked about Western Union and he said, "I bought that stock on February 1, 1950, and I paid thirty-four and two-tenths dollars per share for it," and then did you say to him, in substance, "Well, let's check our records to see if that is right"?

A. No, I didn't.

Q. Your statement is that you accepted whatever he gave you?

A. That's true.

Q. Now I would like to return to Defendant's Exhibit U-7-B and to the second page of it.

Mr. Newcomb: May we give the jury that page, and may the record show that I am handing the witness Exhibit U-7-B, the second page thereof, and at the same time I

am giving him a transcript of the Fox, O'Hara cash account in the name of Dr. Palermo, comprising Government's Exhibits 120 to 128.

[fol. 253] Q. I want to direct your attention to the set of figures that are circled.

On the righthand side under the heading "D and L Short,"—I take it that I have read your handwriting correctly in that heading; is that what it says?

A. That is correct.

Q. I believe Mr. McHugh developed that all of these transactions involved calls?

A. That's right.

Q. This worksheet also is entirely in your handwriting, is it not?

A. That is correct.

Q. Is that right, Mr. Amoruso?

A. That is correct.

Q. These came from a cash account?

A. That's right.

Q. A call is, as Mr. McHugh and yourself stated, a firm right to buy at a fixed figure with a stated term?

A. That's right.

Q. Will you look at the beginning of the cash account, the first page that you have before you—do you have it in front of you?

A. Yes.

Q. Do you observe that unlike most cash-accounts, this one happened to be long at the opening of the year; do you see that?

A. Yes.

Q. It can happen that a cash account will be long for a few days where the security is being transferred, and there is a delivery date, and so forth; that happens?

A. That is right.

Q. Ordinarily in a cash account it is a temporary condition?

A. That's right.

Q. But as of this year do you observe that the cash ac-

count was long on a call of 100 shares of Electric Autolite, which is ET, at \$44 a share, expiring February 2, 1951; do you see that?

A. Yes.

The Court: Where is that?

[fol. 254] Mr. Newcomb: We are reading, your Honor, from the brokerage account of which we do not have the 14 copies.

I apologize to the Court and jury for not telling where I got it.

Q. Right here in this brokerage account you see it is long on a call; do you see that?

A. Yes.

Q. Now, if that call was not exercised before February 2, 1951, the Doctor would have a short-term loss in the amount of whatever the call cost him, right; isn't that right?

A. That is right.

Q. Okay. Did he exercise the call on or before February 2?

A. I don't see any.

Q. So he lost whatever it cost him, correct?

A. Well, there was nothing charged on the statement, so I didn't see it.

Q. You missed it, did you?

A. Well, I don't see any charges for the price of the call on the statement either.

Q. Look at the statement that you had before you when you made the worksheet and tell the jury whether or not it is not perfectly obvious that you, as an accountant, omitted a short-term loss which the statement shows the Doctor to have sustained?

A. The statement does not show it. It does not show any charge for the amount of the call.

Q. Did you think he got it for free?

A. I mean, I can't go back to the prior year and follow this through. I was engaged to just pick up the transactions from a statement. What appeared at the top of the page, if it didn't follow through in here and be charged, I would never know it.

Q. But is it not correct on the face of the transcript of the record, brokerage account, Mr. Amoruso, that the Doctor was long a call of 100 Electric Autolite carried over [fol. 255] from the year before; do you see that?

A. That is right, and that chart probably appeared on the 1950 statement.

Q. That is right.

A. That is right.

Q. And then the one to which the Court has called your attention is a new purchase of another call?

A. That is right.

Q. Of ELO for \$360.55?

A. That is right.

Q. Now, the second call you caught or observed, let us say, and entered in your worksheet?

A. Yes.

Q. Isn't it a fact that you saw the first one but it was too much trouble to find out how much the loss was?

A. I don't think you can assume that. Maybe I didn't see it at all.

New York, December 18, 1957,
10:30 o'clock a. m.

Cross examination (Continued).

By Mr. Newcomb:

Q. Mr. Amoruso, I show you Defendant's Exhibit K-8 for identification, which was mentioned in yesterday's testimony, being the original of your testimony before the special agents on June 14, and read, certified and sworn to by you on August 24, 1956.

Generally, Mr. Amoruso, was that testimony true to the best of your knowledge at the time you gave it on June 14, 1955?

A. It was.

Q. And was it still true at the time you read and swore to it to the best of your knowledge on August 24, 1956?

A. Yes.

Q. Mr. Amoruso, would you take the exhibit and look at page 3, and I am going to read a question in the middle of [fol. 256] the page, and will you please follow along with me as I read:

"Q. Who usually prepared Dr. Paleymo's income tax return?"

And you answered:

"Well, I can't remember offhand. Sometimes—most of the time whoever prepared or wrote up the books for the building would put that information on the return, and the information from the broker's statement would probably be given to me by the person who took it off. The rest of the information would come from the doctor who gave it to Sanfilippo, and I would put it on. I can't say—that is five or six years ago. I couldn't say for certainty. It is difficult for me to say."

Was that testimony true to the best of your knowledge at the time you gave it under oath on June 14, 1955?

A. It was. That is the way I remembered it at that time.

Q. And was that testimony true to the best of your knowledge when you swore to it on August 24, 1956?

A. It was.

Q. Did it come to your attention sometime after August 24, 1956, that the testimony which I have read had been inaccurate?

A. That is right. This testimony was given at a time where all I was shown was typed returns. I had nothing before me such as original copies or retained copies. So this was the best I could remember at the time.

Q. And it did come to your attention after August 24, 1956, that this testimony was in some respects, at least, inaccurate?

A. Yes.

Q. Would you look please at page 4, towards the bottom of the page. It reads:

[fol. 257] "By Special Agent McGowan:

"Q. Did you prepare the returns for 1949 and 1951, Mr. Amoruso?

A. I can't remember—that is six years."

Now, was that testimony true to the best of your knowledge at the time you gave it under oath on June 14, 1955?

A. Yes.

Q. And was it true to the best of your knowledge when you swore to it on August 24, 1956?

A. Yes.

Q. Subsequent to August 24, 1956, did something occur which refreshed your recollection as to whether you had prepared the returns of the Doctor for 1949 and 1951?

A. Well, I believe it was in October of 1956 when I was at Dwight, Royall's office, and I then saw the retained copies.

Q. And that was what refreshed your recollection?

A. That is when I saw the retained copies. So that what I said here was not entirely correct.

Q. That is right. It was true at the time you gave it?

A. That is right.

Q. It was true at the time you swore to it?

A. That is right.

Q. And then later you saw the retained copies and the worksheets, and that refreshed your recollection?

A. That is correct.

Q. And you then recalled that you had, in fact, prepared the Doctor's returns for 1949 and 1951?

A. Correct.

Q. You were shown those retained copies and worksheets at the office of Dwight, Royall, you say?

A. Yes.

Q. At 100 Broadway?

A. Yes, sir.

Q. And Mr. Wells and Mr. Frisch and Mr. Clark were there?

A. As I remember they were present.

Q. Would you look at page 5? I will read from the bottom of page 4 simply to give the context of the material on [fol. 258] page 5. Are you looking at page 4?

A. I am looking at page 5.

Q. Would you go back to page 4, please, and right after the question and answer which I have previously read, there appears the following:

"Q. However you did sign the returns?

A. That's right. That's my signature.

“Q. Did you verify them in any way in connection with the figures contained therein?”

A. Personally?”

Mr. McHugh: Excuse me. Would you read the question just preceding that so that it is clear to the jury what we are talking about?

Mr. Newcomb: Yes. I will go back.

Q. The question that I had previously read to you on the page was:

“Q. Did you prepare the returns for 1949 and 1951, Mr. Amoruso?”

A. I can't remember—that is six years.

“Q. However you did sign the returns?”

A. That's right. That's my signature.

“Q. Did you verify them in any way in connection with the figures contained therein?”

A. Personally?

“Q. Yes.

A. I don't remember whether I did or not. That is a tax return. I can't testify from that.”

Now at the top of page 5, and this is the question and answer to which I am directing my attention at the moment:

“Q. Is it your practice to verify such figures?”

A. If they are prepared by my staff, I am confident that they are prepared correct. I can't check them all. When they come to me, they are complete. I mean in the amount of returns prepared at tax time, it is impossible for me to have an intimate knowledge of everything that is on the tax return.”

[fol. 259] Was that testimony true to the best of your knowledge at the time you gave it under oath on June 14, 1955?

A. Yes.

Q. And was it true to the best of your knowledge when you swore to it on August 24, 1956?

A. Yes.

Q. And did something happen thereafter which refreshed your recollection and made you realize that your testimony, this testimony on page 5, was in some respects inaccurate?

A. Yes.

Q. And what occurred was you saw these retained copies and worksheets at the office of Dwight, Royall?

A. That's right.

Q. Will you look, please, at the bottom of page 5, the very last question and answer:

"Q. In preparation of these returns, did you ever come in personal contact with Dr. Palermo?

A. No."

Was that testimony true to the best of your knowledge at the time you gave it?

A. Yes.

Q. That is, on June 14, 1955?

A. Yes.

Q. And was it correct to the best of your knowledge when you swore to it on August 24, 1956?

A. Yes.

Q. Is it still true?

A. It is. I didn't see the Doctor personally at any time during the preparation of the returns.

Q. Or in connection with the returns?

A. That's correct.

Q. Your contact with him was limited to a telephone conversation?

A. That's right.

Q. Did you talk to the Doctor over the long-distance telephone about his returns?

A. No.

Q. All of your calls were local calls here in New York?

A. That's right.

Q. Would you look, please, at page 6, and I am reading from about the center of the page:

[fol. 260] "Do you know if Dr. Palermo ever supplied your firm with any records of his own? Checking accounts?

A. No, no.

"Q. No bank accounts?

A. No.

"Q. You say he did not?

A. He did not."

Was that testimony true to the best of your knowledge at the time you gave it on June 14, 1955?

A. Yes.

Q. Was it true to the best of your knowledge when you swore to it on August 24, 1956?

A. Yes.

Q. Did it thereafter come to your attention that this testimony that I have read on page 6 had been inaccurate?

A. No, I don't remember seeing any of the Doctor's checking accounts.

Q. Do you remember seeing in the worksheets, the worksheet, for example, by Carrie Artino, that listed all of the deposits of the Doctor's, that being on one worksheet, and on another—

A. I didn't see it at the time, no.

Q. That is, you didn't see it when you were down there at Dwight, Royall?

A. No, I don't remember that.

Q. Have you seen it before you testified here?

A. Yes.

Q. Would you please be kind enough to turn to page 9, referring to—well, I will have to read something before that to set up the context. Would you turn back to page 8.

“Q. Do you know of anybody in your firm who would have personal knowledge of the preparation of these returns?

A. Well, as I said, outside of the books on the building that were written up by us and the broker's statements that he submitted, there wouldn't be anyone who would have knowledge other than what I told you, or Mr. Sanfilippo—that is all.”

Will you now turn to page 9:

“Q. As far as you recall, the only records that your firm ever received are those relating to the brokerage account at Newburger, Loeb, and the records concerning certain real estate—one building.”

[fol. 261] Mr. McHugh: “those relating”.

Mr. Newcomb: I am sorry.

(Continuing reading): “ * * * those relating to the brokerage account at Newburger, Loeb, and the records concerning certain real estate—one building. What is the location of that building?”

A. I think we have it right on the tax return.

"Q. Was it 1784 86th Street—1784 Amsterdam Avenue, New York City?

A. That's right. Amsterdam Avenue."

○ Now comes the question that I am interested in at this moment:

"Q. Did you ever ask if he had any bank interest?

A. Not that I recall."

Mr. McHugh: The answer is "Not that I can recall."

Q. (Continuing reading):

"A. Not that I can recall."

Mr. Amoruso, was that testimony to the effect that you did not, so far as you recall, ever ask the Doctor about bank interest true to the best of your knowledge at the time you gave it on June 14, 1955?

A. It was.

Q. And was it true to the best of your knowledge when you swore to it on August 24, 1956?

A. It was.

Q. Did it thereafter come to your attention that the testimony I have read from page 9 was inaccurate?

A. That's right.

Q. And where did that first come to your attention?

A. Well, when I was working on the, or had a chance later to review the tax returns and see the originals, I could see that there was computation for interest and that the Doctor—and there were notes about the bank interest that the Doctor had.

[fol. 262] Q. And that was when you saw the retained copies and the worksheets?

A. Subsequently.

Q. Sometime subsequent to August 24, 1956?

A. That's right.

Q. Is that right?

A. Yes.

Q. And that was at the office of Dwight, Royall at 100 Broadway?

A. That is what I remembered.

Q. I take it your recollection was then refreshed, is that right?

A. That is right.

Q. And you then had come back to you a recollection which you had not had on June 14, 1955 when you testified before the special agents, is that right?

A. As I said, when I testified before the special agents I had nothing before me except typewritten copies, so I couldn't remember very much from those.

Q. And the same was true, I take it, when you swore to the testimony on August 24, 1956?

A. That is correct.

Q. You had not, up to that time had any opportunity to examine these retained copies or the worksheets?

A. I can't remember any time between then seeing those papers.

Q. Now Mr. Amoruso, if on or prior to June 14, 1955 you had been aware of what was in the retained copies and the worksheets, you could not truthfully have testified that you had never called the Doctor about the bank interest, could you?

A. No, that is right.

Q. And if on or before August 24, 1956 you had been aware of what was in the retained copies and the worksheets, you could not in good conscience have sworn to this testimony, could you?

A. That is correct.

Q. Is that right?

A. That is right.

Q. Did you at any time on or prior to August 24, 1956, tell Special Agent McGowan and Special Agent Harper and Special Agent Lipschitz, Revenue Agent Mishler or Revenue Agent Schreiber that your testimony of June 14, 1955 had been in any respect inaccurate?

A. No.

[fol. 263] Q. Did you tell them or any of them that your testimony of June 14, 1955 had been in any respect misleading?

A. No.

Mr. McHugh: I am sorry, I didn't hear the answer.

The Witness: No.

Q. Did you tell any of the agents on or prior to August 24, 1956 that your recollection had been refreshed and that you now knew that the testimony you had given on June 14, 1955 was in any respect inaccurate?

A. I don't recall that.

Q. No?

A. No.

Q. Did you tell any representative of the United States Government on or prior to August 24, 1956 that your testimony of June 14, 1955 had been in any respect inaccurate?

A. No, as I remember.

Q. Am I correct that when you testified on June 14, 1955 you had completely forgotten the telephone conversations with the Doctor about bank interest to which you have testified here?

A. That is correct.

Q. Would you turn, please, to page 11. Looking at the third question from the top:

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"Q. Mr. Amoruso, to your knowledge, that portion of the returns, that is the figures pertaining to professional income were supplied to Mr. Sanfilippo by Dr. Palermo—is that correct?

A. Usually, yes.

"Q. You say usually—what do you mean by usually?

A. Well, I mean—I'll say in every case the professional information was given to Sanfilippo by the doctor. Strike out the other answer."

When you gave that testimony under oath on June 14, 1955, was it true to the best of your knowledge?

A. Yes.

Q. And when you swore to it on August 24, 1956, was it true to the best of your knowledge?

A. Yes.

[fol. 264] Q. And is it a fact that when you saw the retained copies and the worksheets, there came back to you a refreshed recollection, and you knew that this testimony had been inaccurate?

A. That is correct.

Q. And this refreshed recollection came back to you at this conference at Dwight, Royall?

A. As best as I can remember that is the first time.

Q. Now, if on June 14, 1955 you had been aware of what was in the retained copies and the worksheets, you could not truthfully have said or testified that in every case the figures relating to the professional income were supplied to Mr. Sanfilippo by the Doctor?

A. That is correct.

Q. And you could not truthfully or honestly have sworn to that on August 24, 1956 had you then been aware of what was in the retained copies and the worksheets?

A. That is right.

Q. Would you look at the bottom of page 11, and I am going to go over into page 12:

“Q. The statements that Dr. Palermo submitted to you were in the name of the brokerage house Newburger, Lóeb—is that correct?

A. That is the one I recall. There might have been others. I just don't recall.

“Q. Do you also recall any statements in the name of the brokerage firm Fox O'Hara?

A. It could be, but I don't remember.”

Was that testimony true to the best of your knowledge at the time you gave it?

A. Yes.

Q. Was it true to the best of your knowledge at the time you swore to it on August 24, 1956?

A. It was.

Q. And it was after August 24, 1956 that your memory was refreshed, is that right?

A. That is correct.

Q. Now, at the time your memory was refreshed—

Mr. Newcomb: May I have Government's Exhibit 635?

Mr. McHugh: Yes (handing).

[fol. 265] Q. (Continuing) You wrote the notes which constitutes Government's Exhibit 635 in evidence, is that right?

A. That is right.

Q. And it consists of five pages in your handwriting?

A. That is right.

Q. And you did that at the offices of Dwight, Royall?

A. That is what I remember.

Q. Now, you could not truthfully have given the testimony of June 14 if you had already prepared these notes on June 14—on or prior to June 14, 1955, could you?

A. That is correct.

Q. And you could not truthfully have sworn to the testimony on August 24, 1956 if you had prior to that date prepared these notes?

A. That is correct.

Q. Would you look at page 12 now towards the bottom—well, I think I better start reading further up to give continuity.

Look, Mr. Amoruso, at the point where it says "By Special Agent Lipschitz."

Do you see that?

A. Yes.

Q. On the returns for the years 1949 and 1951, where did you get the itemized deductions that are shown on these returns? Those are the two returns that bear your signature.

A. As best I can recall, the interest, I believe, comes from the broker's statement. The broker, I believe, shows an interest on the margin account, and, I believe, that is where the interest item is picked up from. The 1951 return states brokers and banks. I believe he also had a bank loan, if I am not mistaken.

Q. We want to establish definitely, that you did see these figures from a broker?

A. Yes, I believe in the 1951 return. The bank gives you these little slips, and, as I recall, he brought in a batch of them to show the charge that had been made by the bank.

[fol. 266] Q. Do you recall the name of the bank?

A. I think it is National City Bank."

And here is the question to which I direct your attention:

Q. With respect to the other items of deductions, can you tell us where you got the information?

A. The other information was given by the doctor to

Sanfilippo who then gave them to us. The New York State tax deduction is usually taken from the previous year's New York State Income Tax Return."

Was that testimony true at the time you gave it under oath on June 14, 1955?

A. Yes.

Q. Was it true to the best of your knowledge when you swore to it on August 24, 1956?

A. Yes.

Q. And it was not until after August 24, 1956 that your recollection was refreshed, is that right?

A. That is right.

Q. Then would you look again on the same page:

"By Special Agent McGowan:

"Q. Which of the deductions would you say were given to Mr. Sanfilippo by Dr. Palermo?

A. The only two we got are the contributions and the sales and miscellaneous taxes. Those are the only information given and received by Sanfilippo.

"Q. That is for what return?

A. 1951."

Then dropping but continuing to read, leaving out some colloquy; this is by Special Agent Lipschitz—

"Q. Specifically, as long as you asked that particular question for the year 1949, the return shows contributions: Our Lady of Lourdes, and various \$610.

"Where did you get this figure from, Mr. Amoruso?

A. I stated before, all the items for the other deductions were given by the doctor to Sanfilippo and they were figures submitted by him.

[fol. 267] "Q. I am asking you how you arrived at those figures?

A. He was given the figures by the doctor"—

Mr. McHugh: Excuse me, sir.

Q. "Q. I am asking you how you arrived at those figures?

"By Witness' Attorney:" May I interrupt—that was Mr. Gabrielli?

A. That is right.

Q. He was representing you personally at this hearing?

A. That is right.

Q. This answer apparently was given by Mr. Gabrielli: "He was given the figures by the doctor."

Q. Now the figures totaled \$610.

A. Just as that appeared there, that is the way they were given to me.

Q. Various other items, and churches and office, \$378?

A. That is the way Sanfilippo gave them to me. He said the doctor gave them that way to him."

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Q. Was that testimony true to the best of your knowledge on June 14, 1955 when you gave it under oath?

A. It was.

Q. And was it true to the best of your knowledge when you swore to it under oath on August 24, 1956?

A. Yes.

Q. And you recognize, of course, that it is contradictory to the testimony given by you under oath upon this trial?

A. That's right.

Q. Sometime between August 24, 1956 and the present, time is it your testimony that your recollection was refreshed?

A. As I said yesterday, I don't remember exactly where I got the 1949 figures from, whether from Sanfilippo or from the Doctor. I think in 1949 most of the figures were [fol. 268] given to me by Sanfilippo. It wasn't until 1951 that I got most of the information from the Doctor myself.

Q. Is it your testimony now that for the years prior to 1951 you actually have no recollection where you got any of the figures that you have previously sworn you got from the Doctor?

A. I said that in 1948—

Mr. Newcomb: Your Honor, may I ask that he be directed to answer the question?

The Court: Yes. Will you read the question.

(Question read.)

A. I don't remember.

Q. Now, Mr. Amoruso, would you look at page 14:

"Q. Did you ever see any statements covering the cash accounts with the brokerage house?

A. Not that I can recall."

Was that testimony true when you gave it under oath on June 14, 1955?

A. Yes.

Q. Was it true when you swore to it on August 24, 1956?

A. Yes.

Q. Did it happen sometime subsequent to August 24, 1956 your recollection was refreshed?

A. Yes.

Q. Was it refreshed by the examination of the retained copies and of the worksheets at the office of Dwight, Royall, Harris, Koegel & Caskey at 100 Broadway?

A. Yes.

Q. You never prior to August 24, 1956 examined with care the retained copies and the worksheets?

A. Not that I can remember.

Q. You had not prepared prior to August 24, 1956 the notes in longhand writing which are in Government's Exhibit 635?

A. Not that I can recall.

Q. Mr. Amoruso, I show you Government's Exhibits 107 to 119, inclusive, comprising, I believe, the margin account of the defendant with Fox, O'Hara, and Government's Exhibits 120 to 128, comprising the cash account, I believe, at Fox, O'Hara. At the same time I also hand you Exhibit U-7-B, which is the 14-column sheet relating to the Fox, O'Hara cash account. Will you look, please, at the margin account, the one furthest from you and nearest to me?

A. This is the margin account (indicating).

Q. Look under date of March 27, 1951 and tell me if you find the purchase of a call on 300 shares of KT Preferred at 66 $\frac{3}{8}$, expiring May 25, 1951, purchased for the sum of \$911.25?

A. Yes.

Q. Incidentally, when one suffers a short term loss it is a full deduction, is it not?

A. That is correct.

Q. So that if your office overlooked a loss on this transaction it overlooked a loss of \$911.25?

A. That is correct.

Q. Would you look at the margin account, please, and look over at the end of March. The account was long a call for 300 KT Preferred, the same expiring date and the same call?

A. That's right.

Q. Then look at the end of March. Let us go over to the long position at the top of the page for April, April 30th, and it is still long?

A. Right.

Q. The same call, is that correct?

A. That's right.

Q. And we go past that and look at the next page which is the position at the end of May, May 31. This call was to expire May 25, 1951?

A. Right.

Q. Will you look at the page for May and tell me whether it is not a fact that the call was not exercised?

A. That's right.

Q. So the Doctor suffered a short term loss on the transaction of \$911.25, is that right?

A. That's right.

[fol. 270] Q. So will you look at the original accountant's worksheet, U-7-C, and tell me whether you find anywhere thereon a short term loss of \$911.25?

A. No.

Q. Are you satisfied, Mr. Amoruso, that your firm simply as an accounting and clerical error overlooked this \$911.25 loss suffered by the Doctor?

A. Yes, anybody can make a mistake.

Q. But it is an accounting mistake, is that right?

A. It is a mechanical error, just not being placed on the schedule, that's all.

Q. Let us look for April 3rd in the margin account. Do you see in the margin account under date of April 3rd that the Doctor purchased a call on 100 shares of KT Preferred at 63, expiring June 7, 1951?

A. Yes.

Q. And will you look at the next page and tell me whether it is not a fact that the call was not exercised?

A. That is correct.

Q. And since it expired in June the Doctor suffered a short term loss with respect to that item in the amount of the cost of the call?

A. That's right.

Q. And looking at April 3rd the amount of the cost of that call was \$403.75?

A. That's right.

Q. And that was another accounting error, I take it?

A. That's right.

Q. Pardon me. Would you look at Exhibits U-7-B and U-7-C—and I hope I am not mixed up—but would you tell me whether you find therein a short term loss recording this item?

A. No.

Q. So that you omitted from the return through error a short term loss suffered by the Doctor of \$403.75?

A. That's correct.

[fol. 271] Q. Do you recall yesterday, Mr. Amoruso, that we observed in the cash account for 1951 that as of the beginning of the year the account was long a call on 100 shares of ET at 45 expiring February 20, 1951; do you remember?

A. Yes.

Q. And do you remember we observed yesterday that that call had not been exercised?

A. That is correct.

Q. And we also observed yesterday that the call had not been recorded on your worksheets or included in the return, and I believe you told the jury that you had a limited engagement; do you remember that?

A. That is right.

Q. I call your attention now to Exhibit 94, which is the Fox, O'Hara cash account for 1950, and ask you if you observe the purchase of a call of 100 shares of ET—which is Electric Autolite—at \$44 a share, expiring 2/20/51—meaning February 20; do you see that?

A. Yes.

Q. And the cost of that was \$348.05; do you see that?

A. Yes.

Q. So am I not correct that your failure to include in the 1951 return the item to which I have just referred resulted in a failure to include in that return still another short term loss of \$348.05?

A. This would have been in the 1950 return.

Q. No.

A. This is where it appears.

Q. Well, wait a minute, Mr. Amoruso—

A. This is November 1950.

Q. No, let us look a little more carefully. What is the expiration date of the call?

A. February 20, 1951.

Q. So when is the short term loss realized?

A. February.

Q. What date?

A. The 20th.

Q. Of what year?

A. 1951.

Q. So it should be in the 1951 return, isn't that right?

A. That is correct.

[fol. 272] Q. Now I ask you again, is it not a fact that the failure of your firm to include in the Doctor's 1951 return this item, resulted in a failure to give the Doctor credit for a short term loss of \$348.05?

A. That is correct.

Mr. Newcomb: Your Honor, the testimony of the witness on June 14, 1955, consisting of 14 pages, I offer the whole of it in evidence.

Mr. McHugh: No objection.

(Defendant's Exhibit K-8 for identification received in evidence.)

Q. Do you recall, Mr. Amoruso, that you testified yesterday about an item of 1390 in dividends that was added on to a worksheet in your handwriting? Do you remember?

A. Yes, I believe I remember that.

Q. Here is what I want to ask you: Did you at any time relating to the tax year 1948 make a personal detailed examination of the files of the firm of Arthur R. Sanfilippo & Company to determine exactly what records and documents relating to the account of Dr. Palermo were in your firm's files?

A. I don't believe so.

Q. Well, you know you did not; do you not know that?

A. That is correct.

Q. For the year 1949, the tax year 1949, did you make a detailed personal inspection and examination of the files of your firm to ascertain exactly what records and documents were there and what were not?

A. No.

Q. I ask you the same questions as to the tax years 1950, 1951 and 1952?

A. No.

Q. Is that right?

A. That is right.

Q. Now if you look at the worksheets for a given year, Mr. Amoruso, you can ascertain from the worksheets that [fol. 273] your firm had certain records referred to in the worksheets and on which they were based?

A. Yes.

Q. Am I not correct, however, that there is no way that anybody can say with certainty in any year that your firm did not have a particular brokerage account?

A. No.

Q. Is that right?

A. That is correct.

Q. And that is true of bank statements, cancelled checks and any other records relating to the Doctor's returns; isn't that right?

A. All I can say is that I never saw any bank statements.

Q. Right. And all that you can say on the negative side is that you personally never saw a particular document or type of document?

A. That is correct.

Q. I show you Exhibit U-7-D; the worksheet relating to 1951, and call your attention to the column in the lower center where there are set forth month by month the detailed items of interest on the National City Bank loan. Do you see that?

A. Yes.

Q. All those items are in your own handwriting?

A. That is correct.

Q. We have previously gone over the last item, which is that estimated item, but I observe there are 11 other items. Where did that come from?

A. As I remember, those were the debit memos that we had gotten from the bank, the 11 debit memos, for each month, January to November.

Q. And you are talking about the type of debit memorandum that comes out of a depositor's monthly bank statement?

A. As I remember, all we got were the debit memorandums.

[fol. 274] Q. Yes, but that is the type of memorandum you are talking about?

A. That is right. It comes with the cancelled checks and the bank statement.

Q. And when you saw those debit memoranda, I gather from what you have testified, someone had pulled them out?

A. That I don't know. I don't know whether they were pulled out or whether they were sent in by the Doctor. I don't know how they got into the office, but I didn't see any cancelled checks.

Q. You didn't see any statements—

A. That is correct.

Q. —or cancelled checks, but from some source which you cannot now identify you got the debit memoranda—

A. That is what I recall.

Q. —and the type of debit memoranda that is enclosed in the monthly statement; that is right, isn't it?

A. That is right.

Q. And your testimony is that you don't know who collected them together?

A. I don't.

Q. Now, Mr. Amoruso, I would like to get the number of conferences you had at 100 Broadway. Now there was one conference at 100 Broadway at which I was present?

A. That is correct.

Q. And only one of those?

A. That is right.

Q. Then there was another conference at 100 Broadway at which Mr. Frisch, Mr. Clark and Mr. Wells were present?

A. That is correct.

Q. Was there one or more?

A. I don't remember whether I had one or two conferences with Mr. Wells and Clark. I know one conference I remember was in the fall of 1956; it was starting to get cold, so I don't remember whether it was September or October. I might have had another one with them before that, but it is not clear; I don't remember.

[fol. 275] Q. You know you had one conference with Messrs. Wells, Frisch and Clark?

A. That is correct.

Q. You are not clear as to whether you had two of them?

A. I am not.

Q. And are you clear that you certainly had no more than two with those three gentlemen?

A. I don't think so. I don't think there could be more than two.

CARRIE ARTINO, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. McHugh:

Q. Was there a time when you were employed by Arthur R. Sanfilippo & Company?

A. Yes.

Q. When was that?

A. A period from '45 to '51.

Q. Miss^o Artino, I show you Government's Exhibit 630 in evidence, being a photostat of a draft return in the name of the defendant. Do you recognize any of the handwriting on that return as yours?

A. Yes, I do.

Q. Did you, in fact, prepare all or most of that return? Would you look it over, please.

A. Most of this is in my handwriting.

Q. Pardon me?

A. Most of this is in my handwriting.

Q. I want to direct your attention specifically to the date, March 13, 1951, at the lower righthand corner.

A. Yes.

Q. Is that in your handwriting?

A. Yes.

Q. When did you date this return or this draft?

A. I would think at the time that I completed the return.

Q. Was that when in fact you did date it?

A. I think so.

[fol. 276] Q. Let us go back for a minute to the Schedule A, income from dividends. Do you see that at the top there?

A. Yes.

Q. Is the word "Various" and the figure \$14,627.52 in your writing?

A. That is my writing.

Q. Do you know where you got that?

A. From a worksheet, I believe.

* * * * *

Q. Now, Miss Artino, I hand you Defendant's Exhibit T-7-B, a worksheet headed "Dr. A. M. Palermo, stock transactions, Fox, O'Hara, calendar year 1950."

Is all or any of this in your writing, Miss Artino?

A. The figure in the last column.

Q. Which is what, please? The jury does not have it before them. Speak right out, again.

A. A \$4,000 figure of additional dividends.

* * * * *

A. (Continuing) And the figure \$10,627.52 in my handwriting, and the total of the two.

Q. The total being \$14,627.52, right?

A. Yes.

Q. Now you say the words "Additional dividend" or "Div", as it is here, and the figure "\$4,000" is in your writing, right?

A. Yes.

Q. Do you recall where you got that figure from?

A. No.

Q. Did you make it up?

A. No.

* * * * *

Q. Do you recall if it was given to you by Mr. Sanfilippo?

A. I don't recall who gave it to me or where it came from.

Mr. Newcomb: I didn't get that either. I am sorry, your Honor.

[fol. 277] A. (Continuing) I don't recall whether it was given to me or whether I got it from another worksheet.

* * * * *

Q. Now turn to page 3, please, of the 1950 draft. Do you have that?

A. Yes.

* * * * *

Q. How about the next item, interest, is any of that in your writing?

A. The first line, "Interest on secured loans", and the—

Q. The words below that, "Brokers and banks", are not in your handwriting?

A. No. The two figures and the "Memo," the word "Memo," is not in my handwriting.

Q. These two figures enclosed in parentheses?

A. And the words after the figures, "Bk State" and "Broker's State."

Q. Those are not yours?

A. They are mine.

Q. They are yours?

A. Yes. Just the word "Memo" is not mine.

Q. Oh, I am sorry. The figures and the little words written in there are yours?

A. Yes.

Q. That is "1266.96" followed by the words "Bk State," that is, bank statements?

A. Yes.

Q. And then the figure "2521.83," I believe, those are your figures?

A. Yes.

Q. Followed by the word "Broker's State"?

A. Yes.

Q. Anything else?

A. And the extended figure, too.

Q. The extended total of \$3788.79?

A. Yes.

Q. Where did you get those figures from, Miss Artino?

A. I believe from the worksheets also.

Mr. Newcomb: I am sorry, I did not hear that.

A. From worksheets also.

[fol. 278] Q. Which worksheets, can you tell us?

A. May I look at this?

Q. Yes, you may.

A. Exhibit T-7-C.

Q. That is the worksheet headed "Dr. A. M. Palermo—Recap of Checks"—is that the one you are referring to?

A. Yes.

Q. You got the interest from that?

A. I got the interest paid.

Q. Interest paid from that?

A. Yes.

Q. For both the bank and brokers?

A. I don't know whether that includes all of that.

Q. Would you check and if you can tell us, tell us where you got the broker's interest, and may I suggest that you look at the broker's worksheet, please?

Mr. Newcomb: That is T-7-B.

Mr. McHugh: Thank you, Mr. Newcomb.

Q. T-7-B. There it is. Would you use that?

A. Yes, on that recap of dividend income.

Q. Did you use it for anything else?

A. I used that for the broker's state, \$2521.83.

Q. You mean the interest on the brokerage account, is that right?

A. Yes, and the interest paid on the worksheets, as I said before.

* * * * *

Q. Do you have before you the declaration of estimated income tax by individuals for 1951?

A. Yes.

Q. It bears the name "Anthony M. Palermo," is that right?

A. Yes.

Q. Is there a date at the left there "3/14/51"?

A. Yes.

Q. Is that yours?

A. No.

Q. Is any of the writing on this estimated return yours?

A. The name "Anthony M. Palermo."

[fol. 279] Q. That is all?

A. Yes, and some of the zeros in the figures for line 1.

Q. Yes.

A. And 3.

Q. I don't follow you. You mean the three zeros are yours after the 2?

A. Well, one or two of the zeros, because I have a back-hand slant.

Q. Let us try to clear that up for the jury. They do not have that before them. There is a blank where you estimate your 1951 income tax, and then there is a figure "6417.48."

A. That is my writing.

Q. That is yours?

A. Yes.

Q. And then after that it says, "Estimated income tax for 1951," and then there is a figure "2000."

A. Yes.

Q. You are saying that part of that figure—

A. The "2" is not mine.

Q. Yes.

A. And the first zero after the "2."

Q. Is not yours?

A. No.

Q. The next two zeros are?

A. I am not sure about the third, but the fourth.

Q. The fourth zero is yours?

A. Yes.

Q. Is that all?

A. Yes. And the figures, the other figures, some of the zeros but not the "2" on the third line.

Q. Now let's see. The third line says, "Estimated income tax after deducting estimated tax withheld," is that right?

A. That's right.

Q. Which zeros in that figure of \$2000 are yours?

A. The fourth.

Q. Just the fourth zero?

A. And the line.

Q. It is the third zero only, because there are not four zeros there.

A. The third zero.

Q. Is anything else on that page yours?

A. Line 6 on "Unpaid balance of estimated tax," the zeros appear to be mine, not the "2."

[fol. 280] Q. All the zeros in the figure \$2000 are yours?

A. I think so.

Q. Now, I show you Government's Exhibit 1 in evidence, being the filed copy of the 1950 income tax return of the defendant, and I ask you if any of the writing on that return is yours?

A. Yes.

Q. Keep your voice up, and would you tell the jury what writing is yours, Miss Artino?

A. The two dates after the signature, Arthur R. Sanfilippo and Anthony M. Palermo.

Q. You put in the date "3/14/51" after both signatures, is that right?

A. Yes.

Q. When did you put those dates on that return?

A. I guess the 14th of March.

Q. Was the return completed when you put the dates on?

A. I don't know.

Q. Do you know when you put those dates on, Miss Artino, whether either or both of the signatures were on that return?

A. No.

Q. You don't know?

A. I don't recall.

Cross-examination.

By Mr. Newcomb:

Q. Miss Artino, let us go to that estimate where you recognize some zeros as yours and some figures not. Will you examine that while I will work with a photostat. When you fill out an estimate or declaration of estimated tax, there is a place on the form for you to enter last year's tax, is that right?

A. Yes—no, the present year that you are filing.

[fol. 281] Q. All right, perhaps I used the wrong word in saying last year's tax. When you file the estimate, the declaration of estimated tax for the tax year 1951, you insert on the form the tax shown for the tax year 1950?

A. Yes.

Q. And am I correct that when you made out the estimate, the declaration, you put in it for the 1950 tax the figure \$6,417.48?

A. Yes.

Q. That figure came from the retained copy which you had completed, is that right?

A. Yes.

Q. So that when you completed the retained copy for 1950, the tax at which you arrived was \$6,417.48?

A. Yes.

.

Q. You then went ahead and estimated a tax for 1951?

A. Yes.

Q. If necessary remove that original that you have from the cellophane cover if you need to and see if you cannot tell us the figure that you originally put in the estimate.

A. It looks like it might be 7.

Q. It appears to you, then, that the estimated tax for 1951 that you put in there when you did the work was \$7,000, is that right?

A. It looks that way. I can't be sure.

Q. Then someone came along and changed that figure?

A. Yes. It is not my handwriting.

Q. And whoever changed the figure, it was not yourself who did it?

A. No.

Q. Thus, of the figure which appears on that original pencil copy which you have, the figure "2000," the last two zeros are clearly yours, is that right?

A. On the first line?

Q. Yes, ma'am.

A. No, I think only the third zero.

Q. Oh, I see. The "2" is not yours, is that right?

A. Right.

Q. Then the zero immediately following the numeral "2" is not yours?

A. Right.

Q. Then comes yours?

A. No.

[fol. 282] Q. Is that yours or not yours?

A. No, I don't think that is.

Q. So the only one there is the last zero which you have described as the third zero?

A. That is right.

* * * * *

Q. So that when you originally made this item out you carried down into line 3 the same figure you had inserted in line 1?

A. Right.

Q. So that originally it would appear to you that you wrote "7000" in line 3 just as you had written "7000" in line 1?

A. Yes.

Q. And then would you look at line 7, "Amount paid with this declaration." There if you don't mind I would like to come and look at the original with you. Do you see the figure—and please remember we have to speak out even though you and I are here together—the figure that is there now is "500"?

A. Yes.

Q. And that is what was put down here ultimately to be paid with the return?

A. Right.

Q. And that would be a quarter of the estimated tax, is that right?

A. That is right.

Q. Now will you look at this original with me, and is it not clear to you that the figure you originally wrote in there was at least \$1,000?

A. Yes.

Q. Can you tell us whether the "2s" in this original appear to be in the handwriting of Mr. Sanfilippo?

A. I think so.

Mr. Newcomb: May it please the Court, Miss Artino is one of the witnesses that we have advised the Court that the Government and the defense hold in common. I will

therefore not examine Miss Artino further at this time, because we will have to call her when the defense is presenting its case.

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[fol. 283] ANTHONY CHARLES DeGEORGE, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. McHugh:

Q. Mr. DeGeorge, by whom are you employed?

A. Haskins & Sells.

Q. The accounting firm?

A. That is correct.

Q. Were you formerly employed by the firm of Arthur R. Sanfilippo & Company?

A. I was.

Q. When was that, sir?

A. Approximately November, 1952, through December of 1953.

Q. When you started there in November of 1952 you were still attending the University, were you not?

A. That is correct.

Q. You were working there on a part-time basis?

A. That is right.

Q. And after your graduation in—

A. In June of 1953 I went on a full-time basis.

Q. Now I will show you a worksheet for 1952 that has been marked Defendant's Exhibit V-7-B, and ask you if all or any of that is in your writing.

A. All except the notation on the bottom which refers to the checks.

Q. What is that?

A. All other than the explanation for the check symbol.

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Q. Will you speak up, please. I asked you what you had before you when you wrote up that sheet.

A. I would say—this is not that I remember it, but I am fairly certain that this was prepared from prior year's work papers and it constitutes an inventory of the securities.

Q. Well, you said "not that I remember." Are you just guessing about that?

A. Pardon?

[fol. 284] Q. Are you just guessing about that or does that refresh your recollection in any way?

A. In reviewing the various work papers prior to the trial, I felt that that is what it was prepared from. In other words, looking at the work papers as a whole it indicated that that is what it was prepared from.

As far as remembering what I used to prepare it specifically, I don't know.

Q. You reviewed the work papers with me, right?

A. Yes, and with Mr. Newcomb.

Q. And with Mr. Newcomb. Now do you, in fact, recall today where you prepared that particular worksheet?

A. Where?

Q. Pardon me?

A. What was that? Where I prepared it?

Q. Yes, from what source.

A. As I say, I feel from the review of the work papers that it was prepared—

Q. No, you can't testify to what you feel.

A. Then I can't give an answer, then.

Q. You don't recall, is that it?

A. I don't recall.

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Q. Is that your writing, sir, referring first to the V-7-A? Is that entire schedule in your writing?

A. Yes, it is.

Q. Do you know from what source you prepared that schedule, sir?

A. I would have to give the same answer as before. I don't remember specifically, but I feel it was prepared from the prior year's work papers.

Q. How about V-7-C that was before you? Did you prepare all of that schedule? _____

Mr. Newcomb: Is that the margin account?

A. That is the stock transactions, Newburger, Loeb margin account, correct.

[fol. 285] Q. Now, having examined that sheet, can you tell us what the source of the information was that you put on it?

A. I would say that this came from the—I would say with certainty that this came from the broker's statements.

Q. Now you are referring to which one, sir?

A. V-7-C.

Q. That came from the Newburger, Loeb margin account broker's statements, is that right?

A. That is right.

Q. Now let me show you some of these work papers pertaining to dividends, being Defendant's Exhibits V-7-E, V-7-D, V-7-G, and V-7-F.

First of all, sir, taking Defendant's Exhibit V-7-D, which is headed "Dr. A. M. Palermo—Master Schedule of Dividends and Interest."

Did you write the words and figures on that schedule?

A. The majority of it is in my writing except a note up at the top righthand corner—

Q. Now will you look at V-7-F, a sheet headed "Dr. A. M. Palermo—Stock Transactions—Fox, O'Hara—1952" and tell the Court and jury what if anything on that is in your writing.

A. The notations on the tape which is attached to the schedule are not in my writing, and the notation "File one figure for dividend Fox, O'Hara"—that is not my writing; the rest of it is.

Q. And did you get the figures listed under each named stock from the Fox, O'Hara margin account, do you know?

A. I don't know.

Q. You don't know what the source of that was?

A. I feel that it was not Fox, O'Hara margin account. I feel that this possibly came from the schedule of dividends submitted by the Doctor. I may be wrong about it.

Q. Let us see if we can clear that up.

Mr. McHugh: May we have the Fox, O'Hara margin account statements, please, for 1952?

[fol. 286] Q. * * * Can you tell us whether or not those margin account statements were the source of the information you put on Exhibit V-7-F?

A. Yes, they were.

Q. * * * Do you see the column at the bottom of the V-7-F where the heading "Personal Expense"

Q. And squeezed in there in January do you see the date 1/31/52 followed by the figures 240 with a dash in the decimal column, and then the word "estimated"—did you write that?

A. Yes, I did.

Q. Did you, in fact, estimate the interest expense for January?

A. Yes, I did.

Q. On what basis, sir?

A. Merely an estimate. No basis.

Q. Who instructed you to make the estimate?

A. I would say a superior; specifically I don't know who.

Q. Do you know if it was Mr. Sanfilippo or Mr. Amoruso?

A. I don't know.

Q. Well, at the time you were working on this was sometime in 1953, is that correct?

A. That is correct.

Q. Do you know what time?

A. I could say during the tax season, but it wouldn't help much.

Q. You can't narrow it down any more than that, whether it was January, February or March?

A. No, I don't know.

Q. Now we have a schedule here for Dr. A. M. Palermo, schedule of dividends, with the words "Held pers." off to the right. Do you see that, sir?

A. Yes, I do.

Q. Now, do you recall the source of that, Mr. DeGeorge?

A. This is probably the schedule prepared from the dividends schedule.

[fol. 287] Q. I show you Exhibit 6, what we call the Steiner-Rouse form. You have seen that before, have you not, in my office?

A. Yes, I have.

Q. Do you recall if this was, in fact, the source of the information that you put on this schedule which is labeled "Held personally" or "Held pers."?

A. Yes, it was.

Q. Where did you get that Steiner-Rouse form, Exhibit 6, from, Mr. DeGeorge?

A. Well, they were in the office. Where they came from I don't know. In other words, they were in a file cabinet together with other records of the Doctor's and records of other clients.

Q. When you say "they" are you referring to Exhibit 6 which you are holding in your hand?

A. Exhibit 6, yes.

Q. Just that one document, is that right?

A. No—

Mr. Newcomb: No, that is not what he said.

The Witness: No, that is not what I said.

Q. What did you say?

A. Exhibit 6, in addition to other records of the Doctor, in addition to other records of other clients was in a file cabinet in the office.

Q. And that is where you got Exhibit 6 that you now hold in your hand, is that right, or don't you know?

A. I either got it there personally or it was given to me from there because that is where this type of thing would be stored.

* * * * *

Cross-examination.

By Mr. Newcomb:

Q. Mr. DeGeorge, according to an employment record that we have here, which is in evidence—I could be wrong, but I think it indicates that in 1952 you first appeared

on the payroll—1953, pardon me—you first appeared on the payroll in February. I believe you told Mr. McHugh that your employment began in November 1952. Were you [fol. 288] a part-time employee?

A. Well, I was a part-time employee; however, I felt, and this is going by memory, I felt that I had started in November 1952.

Q. Well, what is the exhibit number? It is Exhibit F-8 and we could be wrong—

A. Well, I could be wrong too, because that is a record and I am going strictly by memory, and I don't know.

Mr. Newcomb: We will check it further, your Honor.

Q. I take it that your recollection of beginning in November 1952 is not so strong that you would contradict the payroll record of the Sanfilippo firm?

A. That's right.

Q. And may we assume that you were not working for them for nothing?

A. I think you could assume that, yes.

Q. So that you began to receive compensation as of the first day that you actually went to work for them?

A. That is correct.

Mr. Newcomb: Your Honor, Mr. DeGeorge is another one of the witnesses in common. I am sorry, we will have to ask him to come back when the defendant is presenting his case, and I therefore have at this time no further questions of Mr. DeGeorge.

Mr. McHugh: I may have one, your Honor. May I see this exhibit first?

Mr. Newcomb: Yes.

Redirect examination.

By Mr. McHugh:

Q. Mr. DeGeorge, do you recall when you worked for the Sanfilippo Company early in 1953 what your rate of pay was?

A. I think it was an hourly rate.

[fol. 289] Q. And what was that?

A. Probably \$1.25 an hour.

Q. And then if I tell you that the payroll record of that firm, Exhibit F-8 in evidence, reflects that you earned \$11.25 for the week ending February 6th; does that refresh your recollection as to when you started there?

A. No, it doesn't. I would assume it is correct, though.

Q. If I tell you that the same payroll records reflect that you had total earnings of \$35 for the week of February 13, 1953, the week ending on that date, does that refresh your recollection?

A. I don't remember any specific payroll.

* * * * *

IRENE LaCOMBE, called as a witness on behalf of the Government, being duly sworn, testified as follows:

Direct examination.

By Mr. McHugh:

Q. Mrs. LaCombe, you were employed by the accounting firm of Arthur R. Sanfilippo & Company, were you not?

A. Yes.

Q. When were you first employed by that firm?

A. January '51.

Q. And when did you leave that firm?

A. December '55.

Q. At the time that you were employed first in January 1951 you were attending St. John's University, were you not?

A. Yes.

Q. Were you working there on a part-time basis?

A. Yes.

Q. And when did you graduate from St. John's University?

A. In June '51.

Q. Did you continue at the Sanfilippo Company?

A. Yes.

Q. On a full-time basis?

A. Yes.

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Q. During the time that you worked at Sanfilippo & Company, restricting yourself to the time when you worked [fol. 290] on 1951 and 1952 tax returns, if you would, did you have any occasion to contact the defendant, Dr. Palermo?

A. Yes.

Q. Tell us when, please, to the best of your recollection.

A. In time, you mean?

Q. Yes.

A. 1952.

Q. And did you contact him personally or in some other way?

A. By phone.

Q. And what was the subject of your telephone conversation?

A. I might have asked him about his medical income for the tax return.

Q. Is it in fact what you did ask him about?

A. Yes, or in connection with stocks, any stock transactions that I might have a question on, I would ask him about that.

The Court: Yes. Are you talking about the year 1952?

The Witness: No, the 1951 return, for the 1951 return.

The Court: It was not the tax year 1952?

The Witness: No.

Q. You said something else about stocks, I believe, before we began to discuss time, is that right?

A. Yes.

Q. Did you at that time have discussions with the defendant in the phone conversation about stocks?

A. Yes.

Q. What discussion did you have?

Mr. Newcomb: Pardon me, we still do not have the time fixed except now we do have the year.

Q. Can you narrow the time down for us, Mrs. LaCombe, please?

A. Well, the tax season would run from January to March, so it could have been any time, January, February or early March.

[fol. 291] Q. Is that the best of your recollection?

A. Yes. I couldn't say January or February or March, specifically.

Q. When you spoke with the defendant then, you said that was by telephone, is that right?

A. Yes.

Q. You said that you also spoke about professional income, is that right?

A. Yes.

Q. What did he say to you and what did you say, to the best of your recollection?

A. I asked him, could he tell me how much he made for the year '51 from his medical profession.

Q. Did he tell you?

A. Yes.

Q. Do you recall the figures?

A. No.

Q. Was any other subject discussed by you and the defendant in that phone conversation?

A. No.

Q. You mentioned the subject of stocks before?

A. Yes.

Q. Was that discussed in that same phone conversation or another one?

A. No, I called a number of times.

Q. In what year?

A. In 1952, the same time as for the professional income.

Q. How many times did you call the Doctor?

A. I don't remember specifically; two or three times, I think.

Q. Was this in January or February?

A. Yes.

Q. Of 1952?

A. Of 1952.

Q. And what were the conversations you had with him at those times, please?

A. I called him about some stock transactions on the margin account from his stock brokers.

Q. Can you tell us the substance of what you said and what he said to you?

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A. I asked him about, to explain the transactions on the margin account, if I couldn't find the cost of an item sold and I wanted to know who could give me any more information on that particular stock.

Q. What kind of information were you asking for?

A. For cost information.

Q. Did he give it to you?

A. I don't recall.

[fol. 292] Q. Do you recall any other discussion that you had with the defendant about stocks or any other subject?

A. No.

Q. In the Sanfilippo office, Mrs. LaCombe, did you see a diary of the defendant at any time?

A. No.

Q. Do you recall seeing any brokerage statements in the name of the defendant?

A. Yes.

Q. When?

A. In both years 1952 and 1953.

Q. Do you know when those came in to the Sanfilippo office?

A. Sometime during the year and we would get the rest of them toward the end of the year, for the full year, for the tax return.

Q. Was this true in both years 1952 and 1953?

A. Yes.

Q. Did most of them come in during the year or at the end of the year?

A. At the end.

Q. And were the accounts which came in margin accounts or cash accounts or both?

A. Both.

Q. Do you know if they were complete margin accounts for either or both years?

A. Yes.

Q. Which year was complete or was it both?

A. Both were complete.

Q. How about the cash accounts, do you know if they were complete?

A. They were incomplete.

Q. For which year or both?

A. For both years.

Q. Do you recall in the years 1952 and 1953 when work was commenced on the defendant's tax returns?

Q. Start with 1952.

A. Did you say when the work was begun?

Q. Yes.

A. I would say around February would be the time.

Q. Do you know?

A. February of both years.

[fol. 293] Q. Do you know when the work was completed in 1952, first of all, for the year 1951?

A. No.

Q. Do you know when it was completed in 1953 for the year 1952?

A. No.

Q. When you were working on these returns did you have occasion to see any signed blank income tax returns of the Doctor?

A. No.

Q. Now I show you Government's Exhibit 6 in evidence, Mrs. LaCombe, and I ask you if you have seen that before in the Sanfilippo office?

A. Yes.

Q. When?

A. In the preparation for the tax return for 1951 in 1952.

Q. You saw that in 1952 for the first time?

A. Yes.

Q. Didn't you, as a matter of fact, tell me you saw it in 1953, sometime in 1953?

Mr. Newcomb: Just a moment. The witness has testified that she saw it in 1952 in the preparation for 1951.

The Court: Objection overruled.

Q. I want you to think back, Mrs. LaCombe, if you will.

A. You asked me when did I see it?

Q. That's right. Do you see the writing, first of all, next to the ticker symbols, ITT, MTW, and so on, on the lefthand side of this sheet?

A. Yes.

Q. Where there is small writing giving the names of the stocks for which those are ticker symbols?

A. Yes.

Q. Whose writing is that?

A. Mine.

Q. And when did you put that writing on them?

A. In 1952.

Q. When the 1951 return was being prepared?

A. Yes.

Q. Do you recall discussing this particular form in my office with me?

A. Yes.

[fol. 294] Q. And do you remember telling me that you had in fact prepared that—I am sorry, withdraw about "prepared"—telling me that you had in fact wrote on that after Mr. DeGeorge had come with the Sanfilippo firm?

A. Yes, when he was working in the Sanfilippo firm.

Q. Just to refresh your recollection, isn't it true that Mr. DeGeorge started with the Sanfilippo firm in February 1953?

A. I don't remember when he started. I said I thought he was there when I was doing this, and I remember that he came a year after I did, so that was in 1952.

Q. You came—

A. In January 1951.

Q. January 1951?

A. Yes.

Q. He came in February of 1953, right?

A. Well, that is what you are telling me but I said I thought he came a year later, which would be 1952.

Q. Well, if he came there in February of 1953, would you accept that for the moment?

A. Yes.

Q. Was he in fact with Sanfilippo when you were working on that Steiner-Rouse form before you?

A. I thought he was there when I was working on it.

Q. To the best of your recollection, was he, in fact, there?

A. I can't say.

Q. Well, look at Exhibit 6 now. There are two years on that exhibit, are there not?

A. Yes.

Q. One headed up at the left in red 1951, and one at the right headed 1952, is that correct?

A. Yes.

Q. Were both years on that form when you first worked on it?

A. I don't remember.

Q. Do you remember who gave you that form, Mrs. LaCombe?

A. No.

Q. When the form was given to you there was just the ticker symbols for the stocks on them, is that correct, and the figures?

[fol. 295] Q. The ticker symbols and the figures, is that correct, Mrs. LaCombe?

A. Yes.

Q. And what did you then do with it?

A. I looked up the symbols in some stock book and interpreted them, what each one meant.

Q. Where did you get the book?

A. From Mr. Amoruso.

Q. And what did you do with that Steiner-Rouse form when you had finished with it?

A. I don't remember.

Q. Did you in fact give it to Mr. DeGeorge?

A. I don't remember.

Q. Now, Mrs. LaCombe, you went over with me prior to trial the photostats of the retained copies of the defen-

nant's income tax returns for the years 1948 through 1952, inclusive, did you not?

A. Yes, sir.

Q. And the 1952 return was the only one on which you had made any direct entries, is that correct?

A. Yes, sir.

Q. And do you recall when we discussed that you told me at that time that it was your best recollection that you received this Steiner-Rouse form in 1953 when the 1952 was being prepared?

A. No.

Q. Well, what is your best recollection now when you received it?

• • • • •

A. I said 1952.

Q. When you were working on the tax year 1952 or in the year 1952?

A. In the year 1952.

Q. Who was it who gave you that form?

A. I don't remember.

Q. What is there now that fixes the year 1951 in your mind as the year when you got it—I am sorry, 1952.

A. Well, in order to prepare the 1951 return because I—I don't remember getting it in any other connection or why I should.

[fol. 296] Q. Could it just as well have been that you got it for the year 1952?

A. For 1952?

Q. Yes, in 1953.

A. It doesn't seem right.

• • • • •

Q. As a matter of fact, Mrs. LaCombe, we were discussing this very form this afternoon after lunch about 1.50 p.m.?

A. Right.

Q. In my office up at the 18th floor?

A. Yes.

Q. Do you recall that?

A. Yes.

Q. And do you recall your telling me that Mr. DeGeorge

was in fact working there at the Sanfilippo firm when you worked on this return?

A. I said I thought he was working there and that he came a year after me. I don't connect this specifically with Mr. DeGeorge.

Q. It was your recollection, was it not, then that he was with the Sanfilippo firm when you got Exhibit 6?

A. Yes.

Q. Is that correct?

A. Yes, that's correct.

Q. Is that recollection correct or has it changed?

A. When you tell me that he came in 1953, so he couldn't have been there, but I am telling you I thought he was there in 1952.

Q. You also said you thought he was there when you got Exhibit 6, the Steiner-Rouse form, is that correct?

A. Yes.

Q. So, in fact, it could have been in 1953 when you got the Steiner-Rouse form, is that right?

A. Yes.

• Cross examination.

By Mr. Newcomb:

Q. Now Mrs. LaCombe, do you have Exhibit 6 before you?

A. Yes.

Q. Do you observe that in every single item for 1951 you wrote in your own handwriting an interpretation of the stock market symbol?

A. Yes.

[fol. 297] Q. And you observed the fact that there is nothing in your handwriting on the 1952 portion of Exhibit 6 relating to the interpretation of stock market symbols?

A. Yes.

Q. So you began with the first item of 1951; you covered every item and stopped exactly at the end of 1951; do you observe that?

A. Yes.

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Q. And is it your recollection that when you did that, whenever the time, that you were working in connection with a current tax return?

A. Yes.

Mr. Newcomb: I have no further questions.

Redirect examination.

By Mr. McHugh:

Q. Mrs. LaCombe, looking at Exhibit 6 again, do you recall my asking you why it was that the entries on the names of the stocks were all in the 1951 side?

A. Yes.

Q. And do you recall your telling me you could not recollect exactly why that was?

A. Yes.

Q. Didn't you, in fact, say that it might have been because there was no room on the 1952 side to write them?

A. There is room on one side here.

Q. Yes, but didn't you suggest that possibility—

A. You suggested—

Q. —saying that that might have been possible?

A. Yes.

Q. Mrs. LaCombe, do you recall if, in fact, when you first got this form both sides of it were filled out or not?

A. I don't recall.

The Court: Mrs. LaCombe, did you need the interpretations of the symbols to be repeated in 1952 if you had used them in 1951? I mean, in the preparation of the tax returns for 1951 and 1952?

The Witness: No.

[fol. 298] The Court: Do you know what this symbol "CPW" means?

The Witness: I would look back there to find it.

The Court: There is not any back there for "CPW".

The Witness: I would have to look it up in the book, then.

The Court: So as far as this shows you never did work out the interpretation of the symbols for 1952?

The Witness: No.

By Mr. McHugh:

Q. Now look at the 1952 side of the Steiner-Rouse form. How many names of stocks are written after the ticker symbols there, excluding the names that are written right on the column? I am excluding the first three entries, Case and Deere—two of the first three entries.

A. One. Minneapolis-Moline.

Q. Is that your writing?

A. No.

Q. Do you know whose it is?

A. Yes.

Q. Whose?

A. Anthony DeGeorge.

Q. And that is written with a question mark after it, is it not?

A. No.

Q. Pardon me, there is a question mark above that, is that right?

A. Yes.

Q. Do you recall Mr. DeGeorge consulting with you about the meaning of any of those ticker symbols on Exhibit 6, Mrs. LaCombe?

A. No.

The Court: Which was the one where you have Mr. DeGeorge's handwriting?

The Witness: Right here (indicating).

[fol. 299] The Court: It says in printing after the symbol "MPW", "Minn.-Moline"; and that is in the 1952 column?

The Witness: Yes.

The Court: The year 1952?

The Witness: Yes.

The Court: Did you find any of Mr. DeGeorge's handwriting in the 1951 column?

The Witness: No, that is all mine.

HAROLD SCHREIBER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

Q. Mr. Schreiber, what is your occupation?

A. Internal Revenue agent.

Q. Are you a certified public accountant, sir?

A. Yes, sir, I am.

Q. When were you certified?

A. In 1955.

Q. Mr. Schreiber, have you prepared certain summaries of the evidence in this case at my direction?

A. Yes, sir, I have.

Q. Upon what, sir, speaking generally now, have you based these charts?

A. I have based these charts on the documents that have been received in evidence.

Q. Mr. Schreiber, I show you Government's Exhibit 646 for Identification. I ask you if you recognize it.

A. Yes, sir, I do.

Q. Is that one of the summaries you have prepared in this case?

A. That is correct.

[fol. 300] Q. Can you tell us upon what you have based the information in that summary?

A. This summary was based on the brokerage account statements, the tax returns filed by the defendant, the accountant's work papers and dividend checks made payable to Anthony M. Palermo, Rosina Palermo, Rose J. Palermo, and Catherine Brady.

Q. And have you based this on documents received in evidence in this case?

A. Yes, sir, I have.

Q. Mr. Schreiber, can you tell us what Government's Exhibit 646 is.

A. This exhibit represents dividend income received by the defendant in 1950, 1951 and 1952 in the form of dividend checks made payable to Anthony M. Palermo, Rosina Palermo, Rose J. Palermo and Catherine Brady, and credits for dividends to the brokerage accounts in the names of Anthony M. Palermo and Rosina Palermo.

Q. All right. Now I direct your attention to the fourth stock from the bottom under the name of Anthony M. Palermo, Radio Corporation of America. I direct your attention to the second grouping of columns "Held by broker" and to the figure \$2,050. Do you see an asterisk next to that figure, sir?

A. Yes, sir, I do.

Q. Can you tell us what that asterisk symbolizes?

A. This is a technical adjustment. It is an omitted dividend which might have been due to an error on the part of the accountant.

Q. Will you turn to page 2 of Exhibit 646—

The Court: I don't understand that. How does it differ from the other ones? Couldn't these others have been due to an error on the part of the accountant?

The Witness: Well, from examination of the work papers, your Honor, it would indicate that in this year the only one [fol. 301] that could have been due to an error of the accountant was that \$2,050.

The Court: You mean all of the differences except that one are differences between the actual receipts and the accountant's work papers?

The Witness: Yes, sir, that is correct.

The Court: Then this is the only case where there is a difference between your schedule based on a failure of the accountants to enter on the returns what appeared on their work papers?

The Witness: That is correct.

Mr. Miller: May I proceed, your Honor?

The Court: Yes.

By Mr. Miller:

Q. Mr. Schreiber, perhaps to clear that up a bit, if I may, you worked from the accountant's work papers in part in preparing this summary, did you not, sir?

A. That is right.

Q. The \$2,050 dividend to Radio Corporation of America to the right of which there was an asterisk appeared on a broker's account statement, did it not, sir?

A. Yes, sir, I believe it appeared on the Fox, O'Hara margin account.

Q. Was it then picked up by the accountants in their work papers?

A. I think—this is to the best of my recollection—I think it was not picked up by the accountant in the work papers.

Q. In other words, it is a situation, sir, is it not, where the accountant has certain broker's statements in front of him and enters them onto his work papers, is that correct?

A. That is correct.

Q. And while going through the broker's statement he omits to pick up certain entries on those statements and transpose them to his work papers?

A. That is right.

[fol. 302] Q. And to the best of your recollection is that the situation with the \$2,050 dividend?

A. Yes.

* * * * *

The Court: Before you go into that may I go back to the technical adjustment on the first page:

Am I right in understanding that that is the only case with respect to dividend income where you found that the reported figures on the return differed from the information which was available to the accountants?

The Witness: No, sir. There are technical adjustments in the subsequent—

The Court: I mean in 1950?

The Witness: In 1950 that was the only one, yes, sir.

By Mr. Miller:

Q. And that, if I may, sir, is as far as dividends are concerned in 1950; is that correct?

A. As far as dividends.

Q. Mr. Schreiber, can you tell us what page 2 represents.

A. Page 2 represents dividend income received by Dr. Palermo in 1951 in the form of checks made payable to Dr. Palermo, Rosina Palermo, Rose J. Palermo and Catherine Brady, and credits to brokerage accounts in the names of Dr. Palermo and Rosina Palermo.

Q. Mr. Schreiber, for 1951 I see that there is one figure with an asterisk to the right of it; is that correct?

A. That is right.

Q. Can you tell the Court and jury where that figure is and what it represents?

A. This again represents an omitted dividend, which might have been due to an error on the part of the accountant.

[fol. 303] Q. Where does that appear on this page?

A. It appears on the line for dividends received from International Tel & Tel Co.

Q. In the second grouping, is that correct?

A. In the second grouping.

The Court: Can I go into that again? Is it true that you worked this up from three classes of papers: one which would be basic for the accountant's purposes like broker's statements, bank statements and things of that sort; then you found the accountant's working papers which were based on that; then you found a third class, retained tax returns which were based on the accountant's working papers?

The Witness: Yes, sir.

The Court: And as I understand it in every case you found that the retained tax returns reflected accurately the final figures on the accountant's working papers?

The Witness: That is right.

The Court: But in two cases that you told us about already, RCA and International Tel & Tel, you found that the accountant's working papers did not reflect the first class, the source papers, which you found and went over?

The Witness: That is right, your Honor.

The Court: Did you have any way of telling what source papers the accountants actually had before them when they made their working paper results?

The Witness: Well, the dividends from the stocks held by the broker were listed on the accountant's work papers, and perhaps on one statement he may have gotten the other dividends, but he erred in reporting one dividend that [fol. 304] was on that statement. In other words, there are several dividends on the statement and he may have gotten two out of the three, so he must have had the statement.

The Court: Who is "he", the accountant?

The Witness: The accountant, yes, sir.

The Court: I see. You found statements and source papers rather than work papers which had a lot of dividends on it and you found all of them carried over on to the working papers except one?

The Witness: That is correct.

Q. How have you treated this technical adjustment of \$240?

A. Well, I reduced the total difference of \$16,999.53 by the \$240, getting a net difference of \$16,759.53.

The Court: That was because the evidence before you indicated the omission of the \$240, which means an error of the accountant rather than a failure of the taxpayer to turn material over to the accountant, is that right?

The Witness: Yes, your Honor.

The Court: But you had no way of telling, did you, whether the accountants may not have had a lot of other information which was not reflected on the return?

The Witness: No, I have no way of telling that.

Mr. Newcomb: Pardon me, did your Honor say the taxpayer or the accountant?

The Court: The taxpayer.

Q. Mr. Schreiber, if the accountants had had such information and had not reflected it on the return, does that mean that they would have had to omit every single entry on all of those other statements that they had?

A. I don't follow that question.

[fol. 305] Q. Well, the Court asked you whether your technical adjustments refer solely to cases where you know the accountants had certain broker's statements and the ac-

countants missed entries on those broker's statements; is that correct?

A. That's right.

Q. Some were reported from those statements and some were not?

A. That's right.

Q. If the accountant did not have any such statements, that would mean, if you were shown his breakdown now, that he would have had to omit every single entry from those statements, is that correct?

A. That's right.

Q. I invite your attention to page 3, sir, of this summary, and I ask you to tell the Court and jury briefly what this represents.

A. This represents dividend income which was received by Dr. Palermo in 1952 in the form of dividend checks made payable to Dr. Palermo, Rosina Palermo and Catherine Brady, and credits for dividends from brokerage accounts in the name of Dr. Palermo and Rosina Palermo.

Q. Mr. Schreiber, I refer your attention to the first grouping on this page, held personally in the name of Anthony M. Palermo. Did you check the accountant's work papers?

A. Yes, sir.

Q. As to those stocks?

A. Yes, sir, I did.

Q. Did you also check Government's Exhibit 6, the Steiner-Rouse form?

A. Yes, sir, I did.

Q. Did you notice any relationship between the two?

A. Well, the accountant's work papers reflected almost completely the dividends as indicated on the Steiner-Rouse form.

Q. You say "almost completely." Will you amplify that?

A. Well, there was a dividend received from Fansteel Metallurgical Company in the amount of \$500 that was interpreted by the accountant apparently to be \$300; so he made an error on the dividends received from Fansteel Metallurgical Company.

[fol. 306] Q. Has this been charged against the defendant, sir?

A. No, sir, it has not.

Q. How have you treated this?

A. I treated this as a technical adjustment.

Q. Aside from that one difference, the \$200 technical adjustment, do the accountant's work papers for 1952 reflect every bit of information on Government's Exhibit 6, the Steiner-Rouse form?

A. That's right.

Q. That of course refers only to those stocks held personally?

A. That's right.

The Court: Did you use the Steiner-Rouse form in preparing your summary for 1951?

The Witness: No, sir, I did not.

Q. Mr. Schreiber, I direct your attention to page 3 for the year 1952, and I ask you, are there any figures with an asterisk to the right of them for that year?

A. Yes, sir, there is.

Q. Can you tell us what those figures are and what they represent?

A. The first figure of \$200 in the grouping on Stocks Held Personally represents an omission of that dividend erroneously interpreted by the accountant.

Q. Are there any—

The Court: Well, it wasn't exactly that. Didn't you tell us that it was a mistaken entry of \$300 for \$500?

The Witness: Yes. The figure on the Steiner-Rouse form was 500 and the accountant interpreted—apparently interpreted that to be 300.

Q. Are there any in the second grouping?

A. Yes, there are technical adjustments in the second grouping also.

[fol. 307] Q. Tell us what the first is, please.

A. The first is the omitted dividend from J. I. Case Company amounting to \$1237.50.

Q. How have you treated that?

A. I have treated that as a technical adjustment.

Q. What is the basis for giving this figure that treatment, sir?

A. This dividend was reflected on the margin account of Fox, O'Hara, and apparently the accountant has access to that particular statement; and since he did not show it as a dividend I treated it as an error on his part.

Q. What is the next technical adjustment for that year, sir?

The Court: Just a minute. Why do you say "apparently the accountant had access to that?"

The Witness: As I recall, it was the January 1952 statement, and he had all the others for that year on the margin account—none of those were omitted, and he either—he should have had that January statement also, in my opinion.

Q. Do you recall, Mr. Schreiber, that for the January 1952 Fox, O'Hara margin account statement the accountant's work papers reflected an estimation of interest?

A. Yes, sir, that is right.

Q. Does that refresh your recollection, sir, as to why this particular dividend was treated as a technical adjustment?

A. Well, since he estimated that interest it can be logically assumed that he did not take the statement; but I treated it as a technical adjustment. If he did not have the statement he should have requested the statement or obtained the statement. He knew it was missing, in other words.

Q. Can you tell us, sir, the next technical adjustment for that year?

A. That represents a dividend from International Tel & Tel Company in the amount of \$320.

[fol. 308] Q. What has your treatment been as to that?

A. Similarly to the one above.

Q. What was your reason, sir?

A. Again there was a dividend on the Fox, O'Hara margin account which the accountant had access to or should have had access to.

Q. What is the third technical adjustment, sir?

A. A dividend from Motorola, Incorporated, in the amount of \$250.

Q. How have you treated that dividend?

A. In the same fashion.

Q. And for the same reason, sir?

A. Yes.

Q. And what is the fourth technical adjustment?

A. A dividend of \$2150 from Radio Corporation of America.

Q. And how have you treated that dividend, sir?

A. The same as the others.

Q. For what reason?

A. That the accountant had access to the broker's account statement, or should have had access to that statement.

Q. I show you Government's Exhibit 649 for identification, sir, and ask you if you recognize it.

A. Yes, sir, I do.

Q. Can you tell us what that is, sir.

A. This is a summary of stock sales and resultant gains and losses in 1950, 1951 and 1952, showing the actual sales, those reported, and the difference.

Q. Now the next figure I see, sir, says "Less technical differences." Is that correct?

A. That is correct, sir.

Q. Will you explain the use of that phrase and the figure on the line opposite that phrase.

A. Well, technical differences as far as capital transactions is concerned was the sale was reported on the defendant's income-tax return, and it was also shown on the accountant's work papers; but there was an incorrect cost basis used. The defendant is not charged with that omission.

[fol. 309] Q. Is that something you have credited to him as a technical difference?

A. Yes, sir; I reduced the difference by any technical differences.

The Court: That is an error rather than an omission, isn't it?

The Witness: Yes, sir.

The Court: They had some cost basis there but it was incorrect?

The Witness: That is right, sir.

Q. I now direct your attention to page 2, the stock sales and resultant gains and losses for 1951.

Q. Mr. Schreiber, can you read on as to the technical difference?

A. The technical differences amounted to \$4,288.28. So the defendant is charged with a difference of \$55.75.

Q. Now, can you tell us what comprised the technical difference for the year 1951.

A. In 1951 the defendant apparently reported all his capital transactions. Using an erroneous basis he obtained a loss of approximately \$4100. I recomputed the cost and the selling price of the securities and I obtained a gain. Adding the loss to the gain that I computed I gave the defendant credit for a total of \$4,288.28.

Q. Did you readjust the cost basis of all sales that was an incorrect cost basis, sir?

By the Court:

Q. Mr. Schreiber, I notice that in describing the technical differences for 1952 you differentiate them from the ones in 1950 and 1951 in that there you say that you do not charge the defendant with the omissions where the [fol. 310] sales were reported and where the accountant may have had access to pertinent brokerage statements?

A. Yes, sir.

Q. Why did you do that?

A. That is a similar instance to the dividends in January, 1952. There was a sale on the margin account which the accountant should have had access to or did have access to, and I felt that the defendant should not be charged with the gain on that sale.

Q. That is, you eliminated some cases, perhaps one case, where the sale was reported on the income tax return, is that right?

A. No, sir, the sale was not reported on the income tax return, but I say the error of omission might have been due to the accountant rather than Dr. Palermo.

Q. Yet you have charged him with the error in every case where he rather than the broker furnished the cost basis?

A. Well, it would not be a question of cost basis in those cases because those were omitted—if I follow your question, your Honor.

Q. I am trying to construe your note. You say the defendant is not charged with the omission. When I talked to you before you agreed that what you were talking about was an error rather than an omission; didn't you?

A. Except for this one case where the sale was on the margin account and the accountant should have had access to it, or did have access to it.

The Court: Do you understand this, Mr. Miller?

Mr. Miller: I think I may be able to develop it a little further.

The Court: All right.

By Mr. Miller:

Q. Mr. Schreiber, as far as the dividend charts were concerned, there were certain errors which reflected omissions by the accountant from the source material which they had [fol. 311] in transposing that to their work papers, is that correct?

A. That is right, sir.

Q. What errors throughout the three years so far as capital gains were concerned?

A. In 1952 there was reflected a sale on the margin account in January of a security.

Q. Do you recall that security, sir? You may refer back to the other exhibits, if you wish?

A. Yes, sir. It was the sale of 50 Motorola on 1/28/52 on the Fox, O'Hara margin account.

Q. Now you say, sir, that that sale was not reflected on the accountant's work papers, is that correct?

A. That is right.

Q. Is that the only one that was not so reflected during the three years?

A. The only sale not so reflected?

Q. The only sale from margin accounts which the work papers reflect were in the possession of the accountants?

A. Yes, sir, that is correct.

Q. All of the other adjustments, I take it, are based on the use of an incorrect cost basis, is that so?

A. Except for one instance.

Q. You are referring to a purchase price in 1950 of Minneapolis-Moline—

A. No, I am referring to a sale of 100 Zenith Radio Corporation on January 27, 1950.

Q. Can you explain that, sir?

A. The accountant reflected in his work papers that selling price to be \$3,318.18. Actually the broker's account indicated it to be \$3,313.18, a difference of \$5.

Q. The only other one where there was an accountant's error in omitting to pick up something from a statement which the work papers reflected were in his possession?

A. That is right, sir.

Q. Now in granting a technical adjustment as far as cost basis was concerned, sir, did you differentiate between where the defendant may have supplied the cost basis or where the brokers may have supplied them?

A. No, sir, I did not.

[fol. 312] Q. In other words, wherever there was an error in the cost basis on the accountant's work papers, that was treated as a technical adjustment, is that correct?

A. Yes, sir.

Mr. Miller: Your Honor, does that clear up the question you had?

The Court: Well, let us see if it does it.

Suppose that instead of the note that you have on page 3 the note read thus: "In those cases where sales were reported on defendant's income tax return where an incorrect basis was used the defendant is not charged with the error"?

The Witness: That is right.

The Court: Is that right so far?

The Witness: Yes.

The Court: And then added to it: "In those cases where the sale is not reported on the defendant's income tax return but the accountant may have had access to the

pertinent brokerage statement the defendant is not charged with the omission."

The Witness: That is right, sir.

The Court: Is that right?

The Witness: Yes, sir.

ROBERT E. FRISCH, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Newcomb:

Q. Are you a member of the bar of the State of New York?

A. I am.

Q. And with what law firm are you connected?

A. Dwight, Royall, Harris, Koegel & Caskey.

[fol. 313] Q. Mr. Frisch, you have before you Exhibit 635 which has been identified as comprising certain notes prepared by the witness, Mr. Amoruso. Have you ever seen that exhibit or those papers before?

A. Yes, sir.

Q. Will you tell us, please, when you first saw them.

A. On or about November 9, 1955.

Q. Where did you see them?

A. In the offices of Dwight, Royall.

Mr. Newcomb: I ask to have marked as Defendant's Exhibit L-8, a carbon copy of a letter of June 4, 1956.

I call your Honor's attention to the fact that this is marked in another connection but this is now a trial exhibit.

(Marked Defendant's Exhibit L-8 for identification.)

Q. I show you Defendant's Exhibit L-8 for identification and ask you to tell us when it was prepared.

A. I prepared this—I dictated this letter on June 4, 1956.

Q. And was the letter ever sent?

A. Not to the addressee, no, it was never sent.

Q. Did it contain an itemized list of the papers that you had intended to return to the Sanfilippo firm?

A. It does.

Q. Did there come a time when Mr. Harper served a subpoena?

A. There did.

Q. Did he come to the office?

A. Yes, after previously phoning.

Q. And prior to his arrival at the office were there one or more telephone conversations between you and him?

A. Yes.

[fol. 314] Q. First, will you tell us of your telephone conversations with Mr. Harper at this time?

A. This would have been on the morning of June 6, 1956. Mr. Harper called me to say that he had and wished to serve on us a summons, what you have been describing as a subpoena, to produce this various data that belonged or came from the Sanfilippo firm, and what would we do about it?

And I told him, as I told him previously, our policy of cooperating was there, and I would be there to physically hand over the data called for by the subpoena.

Q. And did Mr. Harper come to your office?

A. Yes, at approximately 10:30 in the morning of June 6th.

Q. And give you a subpoena?

A. Yes, sir, he did.

Q. Or a summons?

A. He served it on me.

Q. And did you thereafter exhibit to him various documents?

A. Yes, I did.

Q. And did you exhibit to him the documents listed in Defendant's Exhibit L-8 for identification?

A. Yes, I did.

Q. Did you and he compare this list with the subpoena?

A. Not with the subpoena, no, sir. The subpoena is a very general one.

Q. Well, did you go over these items with him?

A. Oh, yes.

Q. Now, in this letter is there a reference to the pieces of paper which comprise Government's Exhibit 635?

A. There is.

Q. I am going to take this a little out of order: at the end of your conference did Mr. Harper sign that piece of paper as a receipt?

A. Yes.

Mr. Newcomb: I offer it in evidence.

Mr. Miller: No objection.

(Defendant's Exhibit L-8 for identification received in evidence.)

[fol. 315] Q. Am I correct that this matter at the bottom of the fourth page of Exhibit L-8 in evidence was written on there by Mr. Harper, reading as follows: The date is set forth first, 6/6/56—meaning June 6th—"Received the foregoing except items 10 (a to e incl.) pursuant to summons issued at this date to Eugene W. Harper, Special Agent IRS."

Now, that is what was signed by Mr. Harper?

A. In my presence, yes.

Q. And items 10(a) to 10(e) inclusive are the five pages which comprise Exhibit 635, are they not?

A. They are.

Q. After delivering the documents to Special Agent Harper and obtaining the receipt, which is Exhibit L-8, did you send a copy of Exhibit L-8 to Mr. Amoruso?

A. Yes.

Q. Did you forward it with an accompanying letter?

A. Yes.

Mr. Newcomb: I ask to have marked as Exhibit N-8 for identification a copy of a letter dated June 7, 1956 from Mr. Frisch to Mr. Amoruso.

Q. I show you Exhibit N-8 for identification, Mr. Frisch, and ask you if that is a copy of the letter you sent to Mr. Amoruso on that date?

A. It is.

(Defendant's Exhibit N-8 for identification received in evidence.)

Q. Were the Items 10(a) to 10(e), referred to in this letter, Exhibit N-8, the five pages which comprise Government's Exhibit 635?

A. Yes.

[fol. 316] Q. Some time after this letter of June 7, 1956, did your firm deliver the five pages which comprise Exhibit 635 to the Sanfilippo firm?

A. I personally caused their delivery.

Q. Did you receive later a receipt for those five pieces of paper?

A. Yes.

Q. To save time I show you what appears to be a receipt dated July 13, 1956, and ask you if it is a receipt which you received from the Sanfilippo firm acknowledging delivery of the five pieces of paper which comprise Exhibit 635?

A. It is.

Mr. Newcomb: I offer it in evidence and ask that it be marked Defendant's Exhibit Q-8.

Q. Mr. Frisch, was there any conference at the offices of Dwight, Royall at which you were present together with Mr. Amoruso at any time subsequent to August 24, 1956?

A. No, sir.

Q. Was there an occasion on which there was a conference at 100 Broadway at which Mr. Amoruso was present?

A. Yes.

Q. Who was present?

A. Mr. Amoruso, Mr. Wells, Mr. Clark of Dwight, Royall, and myself.

Q. * * * At this conference did you show Mr. Amoruso any of the retained pencil copies of the Doctor's tax returns?

A. No, sir.

Q. Did you show Mr. Amoruso any of the Sanfilippo work papers?

A. No, sir.

Q. Did he examine any work papers or retained copies at this conference?

A. No, sir.

Q. Did he make the notes which comprise Exhibit 635 at that conference?

A. No, sir.

[fol. 317] Q. Did he supply you with any notes made by him at that conference?

A. No, sir.

Q. Do you recall whether he made any notes at the conference which you observed?

A. No, sir, he did not.

Q. Specifically was Exhibit 635 or any part thereof written by Mr. Amoruso in your presence at that conference?

A. No, sir.

Q. Was Exhibit 635 or any part thereof written in your presence at any time?

A. No, sir, never at any time.

• • • • •
Cross examination.

By Mr. Miller:

• • • • •
Q. Now, do you remember any discussion with Mr. Harper concerning whether or not he should take the documents comprising Exhibit 635?

A. I do.

Q. Do you recall his explanation to you at that time?

A. I do.

Q. Can you tell the Court and jury what that explanation was?

A. Yes. He felt that these data having been prepared

after the returns had been filed on behalf of Dr. Palermo were not within the scope of the summons he had served on me and the firm, which, incidentally, was my opinion as I stated it to him.

Q. And you agreed with him on that, is that right?

A. Yes, but I gave him the opportunity to make his own decision and take them if he so desired.

Q. I show you Defendant's Exhibit L-8, sir. Can you tell us what the description of the documents comprising Exhibit 635 is on Exhibit L-8?

A. Shall I read it?

Q. Please.

A. "Item No. 10, five sheets and five carbon copies of columnar sheets apparently containing memoranda and captioned as follows:

[fol. 318] "(a) 1948 return

"(b) 1949 return

"(c) 1950

"(d) 1951

"(e) 1952."

Q. Is there any further description of the documents comprising Exhibit 635?

A. No, there is not except in the first paragraph where I described all the data generally.

Q. And I take it you are referring, sir, to the words "work sheets and other data"?

A. Yes, and to the next sentence describing how we had received it.

Shall I read it?

Q. Yes.

A. "The enclosed data had been previously delivered by you to Higgins, Brenner & Higgins and was on September 7, 1955 transmitted by that firm to Dr. Palermo."

Q. I believe you stated before, sir, on your direct examination by Mr. Newcomb that you and Mr. Harper examined all of the work papers and documents at your firm?

A. Yes, sir, that is correct.

Q. Can you tell us whether that was more in the nature of a complete examination or a check-off of certain items?

A. It was a check-off, but at the time we came to these items it was a much more thorough—I won't say we attempted to read them completely, but a much more thorough review of these particular data.

Q. Is it your testimony, sir, that Mr. Harper reviewed each and every page of Exhibit 635?

A. It is my testimony that he looked at every page and looked at it to make sure that they were notes that did not pertain to the contemporaneous preparation of the tax returns.

Q. How long did he spend on it altogether, sir, on this exhibit?

A. On that particular exhibit?

Q. Yes.

A. I would imagine 10 or 15 minutes. We discussed it at the same time. I mean, the time was not completely consumed by Mr. Harper reading it. We were talking about those data at the same time.

Q. Was that the time in which you had the discussion as to where they were prepared?

A. Yes.

Q. And as to why Mr. Harper didn't want to take them?

A. Well, it was Mr. Harper's conclusion he didn't want to take them, yes. It was at that period, yes, we discussed everything concerning these data to which I have already testified.

GLORIA FANELLI, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Newcomb:

Q. Mrs. Fanelli, would you please be kind enough to keep your voice up so that the jury and I may hear you. What was your maiden name?

A. Gloria Pollaci.

Q. And are you related to the defendant?

A. I am.

Q. What is the relationship?

A. He is my uncle.

Q. And are you related to Mr. Arthur R. Sanfilippo?

A. Yes, I am.

Q. And what is that relationship?

A. He is also an uncle.

Q. Was there a time when you were employed in the office of Arthur R. Sanfilippo & Company?

A. Yes, there was.

Q. Would you tell the jury approximately when that was and how long it lasted?

A. Well, I worked full-time in February of 1952--no, February 1946 to August of '52.

Q. Were you employed by the Sanfilippo firm part-time prior to 1946?

A. Yes, I was.

Q. During the time of your full-time employment with the firm, which was from 1946 to August 1952, would you be kind enough to just tell us generally the nature of your [fol. 320] duties?

A. Well, I was an office girl, a girl Friday, I did everything.

Q. Pardon me?

A. I was known as a girl Friday. I did all office routine, typing and stenography, filing, and everything else that went with it.

Q. Mrs. Fanelli, I show you Defendant's Exhibit B for identification and ask you if it is an original check signed by the defendant?

A. Yes, it is.

(Defendant's Exhibit B for identification received in evidence.)

Mr. Newcomb: The check is dated 3-15-51. It is drawn to the order of the Collector of Internal Revenue, in the amount of \$4207.48, and it is signed by the defendant.

Q. Mrs. Fanelli, looking at Defendant's Exhibit B, would you tell me in whose handwriting the date appears to be?

A. Dr. Palermo's.

Q. 3-15-51 appears to be Dr. Palermo's?

A. That is correct.

Q. Then the words "Collector of Internal Revenue," in whose handwriting are those words?

A. Those are also in Dr. Palermo's.

Q. In whose handwriting is the figure "4207.48"?

A. That is in Carrie Artino's handwriting.

Q. And in whose handwriting is the body of the check in which the amount of the check is written out, "Four thousand two hundred seven and 48/100 dollars"?

A. That is also in Carrie Artino's handwriting.

[fol. 321] Q. I show you Defendant's Exhibit C for identification and ask you if it is an original check issued to the Bureau of Internal Revenue signed by the defendant?

A. Yes, it is.

(Defendant's Exhibit C for identification received in evidence.)

Mr. Newcomb: Lady and gentlemen, this is a check of the defendant to the Collector of Internal Revenue dated March 14, 1951, in the amount of \$500.

Q. Mrs. Fanelli, in whose handwriting is the date March 14, 1951?

A. That is in Carrie Artino's handwriting.

Q. In whose handwriting is the portion "Collector of Internal Revenue"?

A. That is in mine.

Q. The portion that reads "Collector of Internal Revenue," you say is in your handwriting?

A. That is correct.

Q. Where did you write that?

A. Where did I write it?

Q. Yes.

A. It would have to be at the office.

Q. Once again—

A. Oh, I am sorry; it was at the office.

Q. That is what you recall?

A. Yes.

Q. And in whose handwriting is the "\$500" on the right-hand side, the numerals?

A. That would be in Carrie Artino's handwriting.

Q. I am sorry, again you said "that would be." Is it?

A. It is.

Q. Then the text, "Five hundred and no/100 dollars," in whose handwriting is that?

A. That is in Carrie Artino's handwriting.

[fol. 322] Q. I show you Defendant's Exhibit D for identification and ask you if that is a check to the Bureau of Internal Revenue signed by Dr. Palermo?

A. Yes, it is.

(Defendant's Exhibit D for identification received in evidence.)

Mr. Newcomb: Lady and gentlemen, this is a check of January 15, 1952, to the order of the Collector of Internal Revenue in the amount of \$4000.

Q. Mrs. Fanelli, in whose handwriting is the date "1-15-52"?

A. In Dr. Palermo's handwriting.

Q. In whose handwriting are the words "Collector of Internal Revenue"?

A. Those are also in Dr. Palermo's handwriting.

Q. In whose handwriting are the numerals "\$4000"?

A. Mine.

Q. And in whose handwriting is the text describing the amount, reading "Four thousand and no dollars"?

A. Mine.

Q. And where physically did you insert the amount of the check?

A. I would have—I did this—

Q. Where?

A. At Sanfilippo's office at 116 Nassau Street.

Q. And on whose instructions did you fill this check out?

A. If it—either Mr. Sanfilippo's or Mr. Amoruso's.

Q. Did you ask or did you receive instructions from the Doctor to insert \$4000 in this check?

A. No.

Q. I show you Defendant's Exhibit E in evidence and ask you in whose handwriting the date of that check is, March 15, 1953?

A. In Dr. Palermo's handwriting.

[fol. 323] Q. In whose handwriting are the words "Collector of Internal Revenue"?

A. Those are also in the Doctor's handwriting.

Q. In whose handwriting are the figures "1593" and then the fraction 46 over a hundred?

A. That would be my Uncle Arthur's handwriting.

Q. Is it in your Uncle Arthur's handwriting?

A. It is.

Q. By your Uncle Arthur do you mean Mr. Sanfilippo?

A. Yes.

Q. And then do you observe the text of the amount of the check, reading "1593 and forty-six one-hundredths"?

A. That is also in Mr. Sanfilippo's handwriting.

Q. I show you what has been marked Defendant's Exhibit F for identification and ask you if it is another original check signed by Dr. Palermo to the order of the Collector of Internal Revenue?

A. Yes, it is.

(Defendant's Exhibit F for identification received in evidence.)

Mr. Newcomb: And I would like to describe this, if I may.

(Addressing the jury) This is a check dated March 15, 1953, to the order of the Collector of Internal Revenue in the amount of \$1500, signed by Dr. Palermo.

By Mr. Newcomb:

Q. Mrs. Fanelli, in whose handwriting is the date March 15, 1953?

A. Dr. Palermo's.

Q. In whose handwriting are the words "Collector of Internal Revenue"?

A. They are also in Dr. Palermo's handwriting.

[fol. 324] Q. In whose handwriting are the numerals "1500"?

A. That is Mr. Sanfilippo's handwriting.

Q. And in whose handwriting is the text of the amount of the check "1500 and no one-hundredths"?

A. That is also Mr. Sanfilippo's.

Q. By the way, in connection with that erased portion which you have testified about, do you recall any time or incident where you heard a conversation or part of one between the defendant and Mr. Sanfilippo on the subject of signing returns in blank?

A. Yes, I did.

Q. Can you fix the place?

A. Well, it took place at Dr. Palermo's office at 145th Street.

Q. That is the house that was at 408 West 145th Street?

A. That is correct.

Q. Who was present as far as participating in the conversation?

A. That would be Mr. Sanfilippo, Dr. Palermo and myself.

Q. Mrs. Fanelli, were you three together?

A. Yes, we were.

Q. Could you tell us about when this occurred?

A. Are you talking about the specific day?

Q. What was the occasion?

A. Well, Mr. Sanfilippo and I were down there and I believe it was—the Doctor was leaving for Florida—I am not sure whether it was Florida that year—and we were

all down there to wish him bon voyage and so forth, and while he was there Mr. Sanfilippo asked him for copies of the return signed in blank. I distinctly remember it because he asked him for two in case the typist made a mistake, which was me, and I was insulted.

Q. Let us see if we can try and fix the year. You left the firm when?

A. In August of '52.

[fol. 325]. Q. And you came with the firm in 1946 full time?

A. That is correct.

Q. The first such time of the year after you came full time with the firm would be in 1947?

A. No, I came directly after graduating in February of 1946.

Q. I see. Now could you tell us when this incident occurred to the best of your recollection?

A. Well, I can't be sure but I would say that it took place—well, you see, when I first started to work there I wasn't a secretary; I was more or less just getting used to the place and becoming a secretary afterward, so I would say it would have to be several years, but I don't know, I don't know the exact date.

Q. You would say it was several years after you began your part-time work for the firm?

A. Yes, but I couldn't give you the exact day.

.

By the Court:

Q. Mrs. Fanelli, I think you said that the conversation about signing the return in blank took place sometime after you came to work part time. Was I wrong in understanding that, or was it some time after you came to work full time?

A. After it was full time.

By Mr. Newcomb:

Q. Am I correct, Mrs. Fanelli, that you said it took place several years after you came to work full time?

A. Yes.

.

Q. I show you Defendant's Exhibit J in evidence, which is an amended declaration of estimated tax for the year 1951, and ask you whether you recognize any of the handwriting on that exhibit?

A. The entire is made out in my handwriting.

[fol. 326] Q. Did you prepare this exhibit on your own initiative?

A. No, sir, I did not.

Q. Did you have any information of your own as to whether the Doctor should pay \$4,000 more on his 1951 taxes?

A. No, sir.

Q. Did you receive from the Doctor personally any information with respect to this transaction?

A. No.

Q. On whose instructions did you raise the Doctor's declaration by \$4,000?

A. That would be Mr. Sanfilippo or Mr. Amoruso.

Q. Was it either one or the other?

A. That is correct.

Q. Do you remember which one it was?

A. No, I am sorry I don't.

Q. I show you Defendant's Exhibit FF for identification, being an envelope postmarked February, 1950, and ask you to look at the envelope itself and tell us whether you recognize any handwriting on the original envelope?

A. No, I don't.

Q. I show you Exhibit GG, being a similar envelope and ask you if you recognize any of the handwriting on that one?

A. This is Mr. Sanfilippo's.

Q. You said "this" and, of course, "this" will not appear in the record. Will you tell the jury what is in the handwriting of Mr. Sanfilippo.

A. The words "February, 1950" on the envelope.

Q. Will you open the envelope—

Mr. Newcomb: I would like to state on the record that the envelope is the ordinary bank envelope in which bank statements are sent, and I am now going to show the wit-

ness certain checks therein, but I wish the Court and the United States Attorney and the witness to know that these documents have been through many hands, and I am going to ask her what she can identify.

[fol. 327] Q. I show you eight cancelled checks and ask you if they are checks signed by the defendant drawn on the National City Bank?

A. They are all written by Dr. Palermo.

* * * * *

May we have the checks marked separately as a single exhibit, and I suggest that we use a subsidiary number, GG-1, if that is satisfactory to the Court?

Received and marked Defendant's Exhibits GG and GG-1

* * * * *

Q. I now show you an envelope which has been marked Defendant's Exhibit HH and ask you if you observe or recognize the handwriting on it?

A. Yes, the handwriting which reads "March, 1950" is in that of Mr. Sanfilippo.

Q. I show you five original checks and I ask you if they are checks signed by the defendant, Dr. Palermo, dated in March and late February, 1950?

A. Yes, they are.

Mr. Newcomb: I offer the envelope in evidence as Defendant's Exhibit HH, and the five checks collectively as Defendant's Exhibit HH-1.

* * * * *

(Marked Defendant's Exhibits HH and HH-1 in evidence.)

By Mr. Newcomb:

Q. I show you another envelope which has been marked for identification Defendant's Exhibit II and ask you if you observe any handwriting or recognize any handwriting there?

A. Yes. The words "April, 1950" are in Mr. Sanfilippo's handwriting.

[fol. 328] Q. And from it I take 11 checks and ask you if they are original checks drawn on the National City Bank and signed by Dr. Palermo?

A. They are.

Mr. Newcomb: I offer in evidence as Defendant's Exhibit II the envelope identified by the witness and the 11 checks also identified by her, and ask that the 11 checks be marked collectively Defendant's Exhibit II-1.

(Marked Defendant's Exhibits II and II-1 in evidence.)

GLORIA FANELLI, recalled as a witness on behalf of defendant.

Q. Mrs. Fanelli, when you were with the Sanfilippo firm, where was your desk in relation to the entrance to the firm's offices?

A. Well, they had a long hallway with a large room. The clients used to walk in the long hallway and I was seated in that large room.

Q. During the years that you were employed in the Sanfilippo firm did you see your uncle, Dr. Palermo, there?

A. No.

Q. Did you go out on audits?

A. No, I was there all the time.

Q. During business hours?

A. That is correct.

Q. Mrs. Fanelli, I show you Defendant's Exhibit I-4 in evidence, being Schedule C of the retained copy for the year 1951 relating to profit or loss from business or profession, and I point to certain writing which is encircled. Can you tell us whose handwriting that is?

A. Yes. That is Mr. Sanfilippo's handwriting.

Q. Do these words read "Figures submitted"?

A. That is correct.

[fol. 329] Q. And is there an initial underneath or an initialing?

A. Yes. That is ARS.

Q. I show you Exhibit GG, the envelope for February, 1950. Do you recognize any handwriting there?

A. Yes, that is Mr. Sanfilippo's handwriting.

Q. That is, the notation in pencil "Feb 1950" is in Mr. Sanfilippo's handwriting?

A. That is correct.

Q. I show you the envelope for March, Exhibit HH. Do you recognize any handwriting on that?

A. Yes, the "Mar" and the "1950" is in Mr. Sanfilippo's handwriting.

Q. I show you the envelope for April, 1950, Defendant's Exhibit II. Is there anything there in pencil in a handwriting which you recognize?

A. Yes. The "Apr" and the "1950" is in Mr. Sanfilippo's handwriting.

Q. How about May, 1950, Exhibit JJ?

A. Well, the words "May 1950" are in Mr. Sanfilippo's handwriting.

Q. June, 1950, Exhibit KK. In whose handwriting are the words "June 1950," if you know?

A. Mr. Sanfilippo's handwriting.

Q. July, 1950, Exhibit LL. In whose handwriting are the words "July, 1950," if you know?

A. Mr. Sanfilippo's handwriting.

Q. Will you look at August, 1950, Exhibit MM. In whose handwriting is that?

A. The "Aug" and the "1950" is in Mr. Sanfilippo's handwriting.

Q. September, Exhibit NN.

A. The "Sept" and the "1950" is in Mr. Sanfilippo's handwriting.

Q. That is, the "Sept"?

A. Yes.

Q. October, Exhibit OO?

A. The "Oct" and the "1950" is also Mr. Sanfilippo's handwriting.

Q. The item for November, Exhibit PP.

A. The "Nov" and the "1950" are also in Mr. Sanfilippo's handwriting.

[fol. 330] Q. And how about Exhibit QQ?

A. That is also Mr. Sanfilippo's handwriting.

Q. The letters "Dec" for December and "1950"?

A. Yes.

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FRANK BERGONZI, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Newcomb:

Q. Mr. Bergonzi, would you be kind enough to keep your voice up so that all the members of the jury may hear. By what corporation are you employed?

A. National Exhibition Company.

Q. Is that a corporation that owns the San Francisco Giants?

A. That's right, it is.

Q. Formerly known as the New York Giants?

A. Yes.

Q. During the course of your employment have your duties included work in connection with spring training trips?

A. Yes, that's right.

Q. Transportation and hotel bills?

A. That's right.

.

Q. Mr. Bergonzi, in the course of your duties in the year 1953 did you travel on the team train on the spring training trip?

A. Yes, I did.

Q. Do you remember when that train left New York in 1953?

A. I have to look at that to refresh my memory.

Q. I show you Exhibit F-9 in evidence and Exhibit G-9 for identification and ask you if they refresh your recollection?

A. February 19.

Q. 1953?

A. 1953.

Q. Were you on that train?

A. Yes, I was.

Q. Was the defendant, Dr. Palermo, on that train?

A. Yes, he was.

[fol. 331] Q. And did that trip go to Phoenix, Arizona?

A. Yes, it did.

Q. And you say it left on the 19th of February?

A. 19th of February.

Q. I show you Defendant's Exhibits X-6, Z-6, Y-6 and A-7. When the Giants were in Phoenix on the spring training trip did they pay the bills?

A. Yes, they did.

Q. The hotel bills?

A. Hotel bills.

Q. For the players?

A. Yes, they did.

Q. For the coaches?

A. For the coaches.

Q. And other club personnel?

A. Yes.

Q. And are the exhibits, X-6 to A-7, inclusive, hotel bills kept by the National Exhibition Club in the regular course of business?

A. Yes, they are.

* * * * *

Q. To what organization were the hotel bills for the players, coaches and personnel submitted?

A. To National Exhibition Company.

Q. By what organization were the bills paid?

A. National Exhibition Company, I must say something, or may I?

Q. Go ahead.

A. The checks actually are of the New York Giants, the New York baseball club. This is operated by National Exhibition Company.

Q. Was it the regular course of business of the baseball club to keep the hotel bills that are submitted and paid for in connection with spring training trips?

A. Yes, they are.

Q. Are those regularly maintained in the club's files in the regular course of business?

A. Yes, they are.

Q. Did the baseball club pay the bills which are Defendant's Exhibits X-6 to A-7, inclusive?

A. Yes, they were.

[fol. 332] Q. Were those bills produced from the files of the baseball club?

A. Yes, they were.

.
(Defendant's Exhibits X-6, Y-6, Z-6 and A-7 for identification received in evidence.)

By Mr. Newcomb:

Q. Mr. Bergonzi, when on the spring training trip did your duties working with the hotel management and checking the bills from time to time while you were down there?

A. Yes, sir, it was.

Q. By the way, how long does a trip to Phoenix take by train ordinarily?

A. Approximately two days and six hours.

.
Q. Did you leave New York on the team train in 1952?

A. Yes, I did.

Q. Can you tell us when it was?

A. I would have to refresh my memory by looking at this.

Q. All right, will you look at Exhibit H-9 to refresh your recollection and tell the jury when the team train left New York that year?

A. I would say February 15.

Q. Did you go to Phoenix that year?

A. Yes, we did.

.
Q. Did the Giants receive this bill, Exhibit W-6, and did they pay it?

A. Yes, they did.

Mr. Newcomb: I offer it in evidence.

Mr. McHugh: No objection.

(Defendant's Exhibit W-6 for identification received in evidence.)

Q. Mr. Bergonzi, before I turn to the next year, when you were on the spring training trip in 1953 did you upon [fol. 333] occasion see Dr. Palermo in Phoenix, Arizona?

A. Yes, almost every day.

Q. Did you see him in Phoenix, Arizona, on the spring training trip in 1952?

A. Yes, I did.

Q. Frequently?

A. Practically every day.

Q. Mr. Bergonzi, I show you Exhibit V-6 for identification and ask you if it is a hotel bill received by the Giants and paid by the Giants?

A. Yes, it is.

Mr. Newcomb: I offer it in evidence.

Mr. McHugh: No objection, your Honor.

(Defendant's Exhibit V-6 for identification received in evidence.)

Q. Mr. Bergonzi, do you recall where in 1951 the Giants went on their spring training trip that year?

A. St. Petersburg, Florida.

Q. And can you tell us when the team train left that year?

A. I have to look at the list there.

Q. All right. I show you Exhibit V-6 and ask you to look at it and see if it refreshes your recollection as to when the Giant team left New York for St. Petersburg that year on this spring training trip?

A. February 27th.

Q. Were you on it?

A. I was on it.

Q. Was the Doctor on it?

A. Yes, he was.

Q. And during the spring training trip did you see him in St. Petersburg, Florida, from time to time?

A. Every day.

Q. In 1951 do you recall whether the Giants during the spring training trip went to Miami?

A. I believe it went one day—

Mr. McHugh: I am sorry, I did not hear the answer.
[fol. 334] (Answer read.)

The Witness: I did not finish.

Q. I show you Defendant's Exhibit I-9 for identification. Would you keep your voice up because the jury and others cannot hear you.

A. I believe it was March 16, 17 and 18.

Q. Of 1951?

A. Of 1951.

Q. Did you go along on that?

A. Yes, I did.

Q. And did the Doctor?

A. I believe he did. Yes, he did.

Q. Well—

A. Yes, he did.

Q. If you need to look at your records to refresh your recollection, do so.

A. He did, yes, sir.

Q. I show you Defendant's Exhibit U-6, being the hotel bill for 1950 and ask you if that is the hotel bill received by the Giants and paid by the Giants?

A. Yes, it is.

Q. Were you on the train that left New York for the spring training trip in 1950?

A. I was, yes.

Q. And was the Doctor on it?

A. Yes, he was.

Q. And where did it go?

A. Phoenix, Arizona.

Q. Can you tell us when the team train left New York?

A. No, I can't answer that without looking at this.

Q. And by "this" you are referring to Defendant's Exhibit V-6? Look at the number on the tab.

A. No. U-6.

Q. Is that U-6?

A. Yes.

Q. Pardon me.

A. I say February 26th.

Q. 1950?

A. 1950.

Q. Mr. Bergonzi, were you on the team train that left New York for spring training in 1949?

A. Yes, I was.

Q. And was the defendant on it also?

A. Yes, he was.

Q. Can you tell us where the train went that year?

A. Phoenix, Arizona.

[fol. 335] Q. And can you tell us approximately when—can you tell us when it left?

A. I would have to look at that record.

Q. You would have to look at the record?

A. Yes.

Q. I show you Defendant's Exhibit J-9 for identification and ask you to look at it and tell the jury.

A. February 26th.

Q. Did you see the Doctor in Phoenix, Arizona, from time to time in connection with the spring training trip in 1949?

A. Yes, I did.

Q. And did you see him in Phoenix from time to time during the spring training trip in 1950?

A. Yes, I did.

* * * * *

CARRIE ARTINO, called as a witness on behalf of defendant, having previously been duly sworn, testified as follows:

Direct examination.

By Mr. Newcomb:

Q. Miss Artino, you have testified here before?

A. Yes, I have.

Q. And you were employed by the Sanfilippo accounting firm?

A. Yes.

Q. From approximately when to when?

A. January of 1945 to October, 1951.

* * * * *

Q. Miss Artino, would you look first at P-7-A, which is entitled "Dr. Anthony M. Palermo 1945" and has listed on it 43 items—that is, items 1 to 43 inclusive.

A. Yes?

Q. Do you have that before you?

A. I do.

Q. In whose handwriting is the "Dr. Anthony M. Palermo" if you know?

A. Mr. Sanfilippo.

Q. And the "1945" at the top?

A. Mr. Sanfilippo.

Q. In whose handwriting are the headings—well, all of the headings on the lefthand side, "Sales," and the headings [fol. 336] under it, and on the righthand side "Purchases" and the headings under that?

A. Mr. Sanfilippo.

Q. Then working downward, in whose handwriting are the items in the first column in lines 1 to 9 inclusive?

A. Mr. Sanfilippo.

Q. Well, I haven't quite gotten over to Purchases yet. Look at the sales side for the moment. Do you see the item dates, the date line or column, the column for the shares and the column for the sales prices under six months? Are those first nine items under the Sales side in the handwriting of Mr. Sanfilippo?

A. Yes.

Q. Now, looking down the page, still on the Sales side, in whose handwriting are the items following item 9?

A. Mine.

Q. And is that true of the dates, the number of shares and the proceeds of sales?

A. Yes.

Q. On the purchase side of Exhibit 7-A, look at the very first item, Electro Autolite in the first line under the heading Date on the Purchases side. In whose handwriting is that?

A. Mr. Sanfilippo—no, it looks like mine.

Q. Do you think that is yours?

A. Yes.

Q. Now, would you be kind enough to look at Exhibit 7-D, the second page. In whose handwriting are the items under the general heading "Sales"?

A. Mine.

Q. Is that also true of the headings, that is, the word "Sales" and the words "Dates" and "Sh" for shares, and "Under six months"?

A. Yes.

Q. While we are on the headings, are all the headings on the righthand side also on the first sheet in your writing?

A. Yes.

Q. And is the title at the top in your handwriting, "Dr. Anthony M. Palermo 1945"?

A. Yes.

[fol. 337] Q. I think that I have covered this, but are all of the items on the sales side in your handwriting?

A. Yes.

Q. Do you have before you the original work sheets entitled "Dr. A. M. Palermo 1945, Sale of Capital Assets, Under Six Months?"

A. Yes.

Q. Would you look at P-7-D and tell us in whose handwriting it is?

A. Mine.

Q. Now look at P-7-E and tell us in whose handwriting that is, except for the notation which stands by itself on the bottom, and I will come to the notation in a moment?

A. All except on line 57.

Q. And what is on line 57? Radio Corporation, is that in your handwriting?

A. Yes. The sales date is not mine.

Q. I call your attention to the fact that on Exhibit A-8 in evidence, being a copy of the Doctor's tax return for 1945, prepared in the Sanfilippo office, and would you direct your attention to the figures relating to short term and long term gains and losses. What were the total sales proceeds reported on the tax return for transactions under six months?

A. \$60,385.18.

Q. Now I show you a tape—I call your attention to a tape annexed to the exhibit and ask you whether it also shows a total of \$60,385.18?

A. Yes.

Q. And I call your attention to Exhibit P-7-E and ask you if on the second page it has a footing on the sales side in the same amount, \$60,385.18?

A. Yes.

Q. Did you at my request compare the tape and Exhibit 70 and Exhibit 70 and the footing on 70 and the figure 60,385.18 set forth on the tax return?

A. Yes.

Q. And did you and I, working together, check over each item on the tape and on the exhibits?

A. Yes.

[fol. 338] Q. Am I not correct that the total reported on the tax return does not include anything for 13 items on Exhibits 7-D and 7-E as to which on the purchase side there is a question mark?

A. Yes.

Q. Did we also check the tape and the exhibits as to the item on 7-D designated No. 11, being the second item on 7-D? Do you see that one?

A. Yes.

Q. Montgomery Ward; do you see that?

A. Yes.

Q. And it gives the date of the sale and the amount and then it gives a purchase price with a notation (50)?

A. Yes.

Q. And did we check the tape and ascertain that that item also was omitted?

A. Yes.

Q. It would appear, therefore, would it not, that there were omitted from the 1945 return some 14 sales transactions listed on Exhibits 7-D and 7-E; is that right?

A. Yes.

Q. Did you have any communication with Dr. Palermo with respect to this tax return?

A. Not that I recall.

Q. Do you have any independent recollection with respect to these items?

A. No.

Q. Was it your practice to follow, to the best of your ability, the instructions of your superiors in the office?

A. I tried, yes.

Q. And did you omit these transactions on your own initiative?

A. No.

Q. On Exhibit P-7-F are the headings in your handwriting?

A. No.

Q. In whose handwriting are they?

A. Mr. Sanfilippo's.

Q. Now as to the items beginning with line 1, Electric Auto-Lite, and going through to the bottom of the page, item 47, I think, are they in your handwriting?

A. Not all.

Q. Are most of them? I am just trying to save time but I think perhaps we better check them then. On the lefthand [fol. 339] side where the names of the corporations involved are set forth, in whose handwriting are the first seven items, the names of the companies and the ditto marks?

A. The first six are Mr. Sanfilippo's and the ditto marks, and the ditto marks on line 7 are mine.

Q. Then the words "Less than six months" in line 8?

A. The number 8 is Mr. Sanfilippo's. The words "Less than six months" are mine.

Q. Would you look at P-7-G. How about the items in the lefthand column, the names of corporations and the number assigned to each transaction and the legend "Less six months"?

A. All mine.

Q. Now, down underneath that, do you see the writing "Exclusive of incomplete transactions"?

A. Mine.

Q. All right, let us identify the writing under the heading "Dates." Do you see that?

A. Yes.

Q. What about that?

A. Lines 48 through 57 are mine.

Q. Under the heading "Sales"?

A. All mine.

Q. And under the heading "Purchases"?

A. All mine.

Q. Including the question marks?

A. Yes.

Q. Now, did you and I go to work with the tapes as to these exhibits also?

A. Yes, we did.

Q. Will you get the tape in front of you?

A. Yes?

* * * * *

Q. Would you tell us the proceeds of the sales?

A. \$76,521.30.

Q. And what were the cost figures?

A. \$56,547.82.

Q. And do you find these figures set forth on Exhibit P-7-G on the footings in your handwriting?

A. Mine, yes.

Q. And did you and I outside of court check over the two tapes?

A. Yes.

Q. Which are annexed to Exhibit P-7-F, is that right?

A. Yes.

[fol. 340] Q. And am I correct that as to the three transactions on P-7-G as to which question marks appear on your worksheets, these particulars are omitted from both the total sales reported and the total cost of acquisition as set forth in the return?

A. Yes.

Q. Did you have any communication with the Doctor with respect to the omission of these items?

A. No.

* * * * *

Q. Miss Artino, would you get before you Exhibit P-7-C, which is the cash account worksheet. I show you what has been marked Exhibit C-8 for identification and ask you to look on it and see if you can identify any of your handwriting?

A. Yes.

Q. What do you see in your handwriting?

A. The word "vault" after "Montgomery Ward" under the January 4th date in the description column.

Q. This is the first page, is that right?

A. Yes, and the number "300-100 Pen."

Q. All right, go ahead.

A. The number "200-sold." The number "100 in vault." The word "open."

Q. That is next to the item for Electric Auto-Lite at the bottom of the page? I am not going to ask you to identify each item but do you see anything in your handwriting on the second page?

A. Yes.

Q. Do you see anything in your handwriting on the third page?

A. Yes.

Q. The next page?

A. Yes.

Q. The next page?

A. Yes.

Q. And the next page which is a page largely devoted to April?

A. Yes.

Q. The page for May?

A. Yes.

Q. The second page for May?

A. Yes.

Q. And would you just look at the next nine pages and tell us if on each of them you see some of your own handwriting?

A. Yes, on all the rest of the pages.

[fol. 341] Q. You say that you left the Sanfilippo firm in the fall of 1951?

A. Yes.

Mr. Newcomb: I offer in evidence in its entirety the brokerage account identified by the witness as being the Fox, O'Hara account consisting of 17 pages, according to my count, as Defendant's Exhibit C-8.

(Defendant's Exhibit C-8 for identification received in evidence.)

Mr. Newcomb: At this time, your Honor, we would like to substitute a photostat for the original exhibit. There was also received in evidence on the cross-examination of Mr. Sanfilippo Defendant's Exhibit B-8, being a cash account of Dr. Palermo with Fox, O'Hara for 1945. At that time it was agreed that certain writings on it believed to have been placed on it at a later date would be excised and we would prepare another photostat without them, which we have done, and I ask to have the photostat substituted in evidence as Defendant's Exhibit B-8.)

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Mr. Newcomb: Mr. McHugh suggests that we may not have had the first page of this in evidence but I can solve that problem, and he may well be correct.

Q. I show you the original, which was B-8, and ask you if you observe thereon any of your own handwriting?

A. Yes.

Q. Those little numbers in circles are yours?

A. Yes.

Q. And also you point to the writing up in the upper righthand corner, the telephone number?

A. Yes.

[fol. 342] Q. HA-2-9695; is that in your handwriting?

A. Yes.

Mr. Newcomb: I now offer the first page of the exhibit, if it is not already in evidence.

Mr. McHugh: May we have the witness tell us when she prepared this, if your Honor please?

The Court: Yes, you may ask her.

Mr. McHugh: May I?

The Court: Yes.

Mr. McHugh: Miss Artino, do you know when you worked on this first page of this brokerage account, which is Defendant's Exhibit B-8?

The Witness: No, sir.

Mr. Newcomb: Was there an answer?

Mr. McHugh: She said "No, sir."

May I ask one more, your Honor?

The Court: Yes.

Cross examination.

By Mr. McHugh:

Q. Miss Artino, did you at any time work on these brokerage accounts after you left the Sanfilippo firm, after you left their employment?

A. No, sir.

Q. Looking at Exhibit P-7-C, Miss Artino, in whose handwriting is the heading?

A. "Dr. Anthony M. Palermo"?

Q. Yes.

A. Mine.

Q. The year?

A. Not mine.

Q. In whose handwriting are the numerals 1945?

A. Mr. Sanfilippo.

Q. There is a question mark next to it. Can you identify that?

A. It appears to be Mr. Sanfilippo's.

Q. In whose handwriting is the word "sales"?

A. Mine.

[fol. 343] Q. The rest of the headings?

A. All mine.

Q. In whose handwriting are the entries?

A. All the way down?

Q. Yes, ma'am.

A. All mine.

Q. Would you look at Exhibit A-8, the tax return. Is that Exhibit A-8?

A. Yes.

Q. Would you look, please, on the schedule D, Capital Gains and Losses.

A. Yes?

Q. Have you got that before you?

A. Yes.

Q. Do you remember we have been over the figures on long term and short term proceeds of sales and costs of acquisition?

A. Yes.

Q. Am I correct that every single one of the 46 transactions reflected on P-7-C were omitted from the tax return?

A. Yes.

Q. Did you have any communication with Dr. Palermo about that?

A. No.

Q. In whose handwriting is the first page of Exhibit A-8 in evidence, namely, the copy of the 1945 return?

A. The whole page?

Q. Yes, if you can tell us.

A. Mr. Sanfilippo, except for—

Q. Keep your voice up.

A. Except for—"to which Collector's office was it sent? —3rd District"—not his.

Q. Those two items down in the lower lefthand side, the notation "1944" and the notation "3rd Dist" are in someone else's handwriting?

A. Yes.

Q. And there are some notations up in the upper lefthand corner which are not in his handwriting?

A. That is right.

Q. But the rest of that page is in his handwriting?

A. Yes.

Q. When you were doing the work on these exhibits embraced in or given the general number P-7, where did you do the work?

A. P-7-C?

[fol. 344] Q. Well, all of these insofar as you worked on them.

A. In the office.

Q. In the Sanfilippo office?

A. Yes.

Q. Do you recall who was in charge of the office at that time, which would be early 1946?

A. Mr. Sanfilippo.

Q. Do you recall any instructions that you received with respect to this 1945 work?

A. No, sir.

.

Q. Miss Artino, I show you Defendant's Exhibit Q-7 in evidence, being the worksheets for 1946, and ask you to hold before you Exhibits Q-7-A and Q-7-B and Q-7-C.

A. Yes.

Q. I ask you, Miss Artino, if you will look at Exhibit Q-7-B, being a page entitled "Dr. Anthony M. Palermo," a 14-column spread sheet. Do you have that before you?

A. Yes.

Q. In whose handwriting are the headings, if you know?

A. The name, "Dr. Anthony M. Palermo, Fox, O'Hara, Number of Shares, Description, Date, Sale, Purchase, Sales Net, Purchase Gross," Mr. Sanfilippo's.

Q. Then go on with the headings.

A. "Profit, Over Six Months, Less Six Months," Mr. Barranco.

Q. Is that Anthony Barranco?

A. Yes.

Q. Was he one of the men in the Sanfilippo firm?

A. Yes.

Q. Go down, if you will, towards the middle of the page on the lefthand side, and look at "Fox, O'Hara Cash Account."

A. Mine.

Q. And the items under it I believe are too, "Emerson Radio Co." and "Standard Gas"?

A. Mine.

Q. In whose handwriting?

A. Mine.

Q. Then there appears to be a date or a notation immediately above the word "Business" towards the right. Do you see that?

A. Yes.

[fol. 345] Q. In whose handwriting is that, if you know?

A. It appears to be Mr. Sanfilippo's. The word "Chrysler" and the amount of "1800".

Q. Are in whose handwriting?

A. Mr. Sanfilippo's.

Mr. Newcomb: Your Honor, Mr. Thomas Shine, the accountant who went to Maine, is here this morning. I anticipate that he will be a very brief witness and I ask the Court's permission to interrupt the direct testimony of Miss Artino to call Mr. Shine.

Mr. McHugh: No objection, your Honor.

The Court: Very good.

(Jury in box.)

THOMAS SHINE, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Newcomb:

Q. Mr. Shine, would you keep your voice up so that the members of the jury over at this end can hear you as well as the ones close to you?

A. Yes, I will.

Q. What is your occupation?

A. I am an accountant.

Q. By whom are you presently employed?

A. Leslie Banks Company.

Q. Was there a time when you were employed by the accounting firm of Arthur R. Sanfilippo & Company?

A. I was.

Q. Could you tell us approximately when you were first employed by them?

A. To the best of my knowledge, it was some time in February 1953.

[fol. 346] Q. And how long did you remain with them?

A. I stayed there until about July of the same year.

Q. Did you work for them at any time thereafter?

A. No, sir.

Q. According to the payroll record in evidence, Defendant's Exhibit F-8, you first appear on the payroll records as having received compensation on February 27, 1953. Does that coincide with your recollection?

A. Well, I wouldn't know the exact time. I know it

would be some time in February, but exactly when I don't know. That is probably right. I have no idea of what the definite date was.

Q. You were working there for pay, I take it?

A. Oh yes, yes.

Q. So that there was no time when you were working there that you were not receiving compensation?

A. That's right.

Q. Mr. Shine, I show you Defendant's Exhibit W-5 in evidence, which appears to be a worksheet relating to some medical expenses, and would you tell us whether you recognize any of the handwriting on that page as being in your own hand?

A. Yes, I do.

Q. Is most of the material on there in your handwriting?

A. Well, all the writing—most of the writing here is mine but the headings are not mine and the summary at the bottom.

Q. At the lower left?

A. Yes.

Q. The material under the word "Summary" in the center of the page and then there are such things as Stumpp Ambulance and so on?

A. That's right.

Q. And that material under the Summary is in your handwriting?

A. Except this would not be mine.

Q. Pointing to a footing: is that what it is?

A. It looks like "Medical."

Q. Medical?

A. Yes.

[fol. 347] Q. You are pointing to the word "Medical" at the very bottom?

A. That's right.

Q. That is not in your handwriting?

A. No, that would not be mine, and neither would these figures.

Q. Nor the final footing at the very bottom of the page?

A. Plus the item of "200?"

Q. Plus the item of "200"?

Mr. McHugh: I cannot hear the witness.

Q. Plus the item of "200" immediately above it?

A. That's right.

Mr. Newcomb: May it please the Court, we offer in evidence from Defendant's Exhibit X-7 for identification, which is the Sanfilippo assignment diary—we offer the whole of it up to and including February 21, February 21 being the first day of 1953 in which Mr. Shine's name appears.

Mr. Miller: If the Court please, may we inquire as to the purpose of this offer?

Mr. Newcomb: Mr. Sanfilippo testified here that on February 14, 1953 he went over all of the final figures in the 1952 return. This witness, in whose handwriting we have now established the medical schedule, did not come there until February 21st, and we offer the book to prove Mr. Sanfilippo's statement could not possibly be true.

Mr. Miller: May I examine on the voir dire as to that, your Honor?

The Court: Surely.

[fol. 348] Q. Mr. Shine, do you recall being interviewed by me in my office on October 31 of last year?

A. That was the first interview I had with you?

Q. That is correct.

A. Yes.

Q. And do you recall being shown at that time, sir, a photostatic copy of Defendant's Exhibit V-7?

A. I was shown a number of papers that day; I was shown a number of papers I remember that day. Whether this was exactly everything I don't recall.

Q. Do you also recall at that time, sir, being shown Government's Exhibit 632 in my office?

A. I was shown a number of exhibits. Whether I could specify exactly which ones, I don't recall.

Q. Do you recall, sir, being asked whether you had done any work on a tax return of the defendant in this case?

A. Yes.

Q. Do you recall your answer?

A. I says to my knowledge I could not recall ever doing it.

Q. Do you recall being shown the two exhibits that you have before you and being asked whether you recognize your handwriting on any of the pages in either of those exhibits?

A. I was shown exhibits and asked if I could identify them, that is right.

Q. At that time, sir, did you recognize any handwriting on those exhibits?

A. No, sir, I did not.

Q. Do you have any recollection of working on Defendant's Exhibit W-5?

A. No, I did not, not up until the time I saw it, and I still don't recall working on it, but that is my handwriting.

Q. Is it your handwriting on the numbers underneath the topic headings?

A. No, it is not. Some of this does not look like my handwriting, I would say.

[fol. 349] Q. Well, sir, are these numbers referring to the dates for the Stump Ambulance, 4-15 and 4-29 in your handwriting?

A. I don't know. It is hard to say. It is hard to say. It may be and it may not be.

Q. Are these numbers immediately to the right, \$15?

A. That would be mine. That is peculiar to my handwriting, that 5.

Q. You are referring now to the two \$15 items?

A. That is right.

Q. Are these numbers under Y. Costley in the center of the page your numbers?

A. It is much easier to identify handwriting than numbers. Numbers are pretty hard to identify. It could be mine, but yet it could be somebody else's also.

Q. Can you testify, sir, that they are yours?

A. I wouldn't want to, I don't think. It is hard to say.

CARRIE ARTINO, resumed.

Direct examination (Continued).

By Mr. Newcomb:

Q. Miss Artino, we had been looking at Q-7-B, which is the 14-column sheet entitled "Dr. Anthony M. Palermo," and I think we had just finished that one. Now let us look at the other 14-column one, Q-7-C, entitled "Mrs. Rosina Palermo." Do you have that one before you?

A. Yes, I do.

Q. In whose handwriting is the heading "Mrs. Rosina Palermo—Fox, O'Hara Cash Account"?

A. Mine.

Q. In whose handwriting is the year "1946," the numerals?

A. I believe Mr. Sanfilippo.

Q. In whose handwriting are the headings in the next lines following?

A. Mine.

[fol. 350] Q. Tell us in whose handwriting the balance of the material on this page is.

A. Under the column headed "Number of shares" all the figures in that column are mine, and the description column, all the wording is mine. Under the date column for Sales, all the dates are written in my handwriting. Under the column headed Purchases all are mine except the date "5-15-46."

Q. Now, would you take the little slip of paper which is marked Exhibit Q-7A. In whose handwriting is that?

A. All of that is mine.

Q. Do you see at the top it is headed "Rosina Palermo," and then it reads "1. Get statement Fox, O'Hara covering January 1946 to March 1946 and July to present date."

Do you see that?

A. Yes.

Q. If you look at your 14-column spread sheet, Q-7, do

you observe that you have some sales in April, May and early June? Do you see that?

A. Yes.

Q. Looking at the 14-column work sheet, do you presently recall what instructions you had with respect to its preparation?

A. No.

Q. Did you do it on your own initiative?

A. No.

Q. Did you have any communication directly with Dr. Palermo about it?

A. No.

Q. In preparing it were you working in the Sanfilippo office?

A. Yes, I was.

Q. Do you have any recollection of what happened to this item of "Get statement from Fox, O'Hara covering January to March and July to the present date"?

A. As to whether we ever received the statement?

Q. Yes.

A. No, I don't; I don't recall.

Q. Do you recall receiving any instructions, yes or no, to do it or not to do it?

A. No, I don't recall.

Q. Look under "Dr. A. M. Palermo" on the note. Do you see under that "Get statement from Steiner-Rouse & [fol. 351] Co. from January 1946 to present date". Do you see that?

A. Yes.

Q. Do you recall whether that was done or not?

A. I am afraid not; I don't know.

Q. You don't recall?

A. No.

Q. Then "Get statement from Bache & Company from January 1946 to the present date".

A. I can't remember.

Q. That is all in your handwriting?

A. Yes.

Q. Do you have any recollection of whether or not any tax return was ever made up reflecting the items on Q-7C,

that is, the 14-column spread sheet relating to Rosina Palermo?

A. I believe the purpose in making this up was to include it in the tax return.

Q. Do you have any actual recollection of whether it was done?

A. No.

Q. One more question on that line. I take it that you are not the one to make the decision as to what should be done in that respect?

A. No.

Q. Is that right?

A. That's right.

.

Q. Miss Artino, did you have any accounting training before you went with the Sanfilippo firm?

A. Only through high school.

Q. And had you gone beyond high school?

A. No.

Q. Until you left in the fall of 1951 did you have any accounting training outside of that which you acquired from the office?

A. No.

Q. Do you recall working on any other accounts in the Sanfilippo office that had stock transactions of the nature of Dr. Palermo?

A. I recall one, but I don't know whether it was the exact type, but there were stock transactions involved.

Q. Were there any as extensive as the doctor's?

A. Than what I had in mind, yes.

Q. Which one was that?

A. Dr. Dean.

[fol. 352] Q. Other than that there were no others?

A. None that I can recall.

.

Q. Once again, Miss Artino, remember, although I stand here, remember the jury if you will.

Looking at Exhibit YY, which is the first page of the retained copy for 1950, do you observe in the lower right-hand corner the date 3/13/ 51?

A. Yes.

Q. Is that in your handwriting?

A. Yes.

Q. With reference to the time you completed the draft of the tax return, what does that 3/13/51 indicate?

A. That the tax return was completed as far as I was concerned on that day.

Q. According to the practices of the office while you were there and your own practices while there, was it your practice to fill out a return and put in all of the calculations of the tax as well as the supporting figures? Was that your practice?

A. Yes.

Q. When you had done that had you "completed" the return in the sense that you have just used the words?

A. Yes.

Q. And did you do that here?

A. Yes.

Q. On Government's Exhibit 1 in evidence, being the original return for 1950, do you observe anything in your handwriting on the first page?

A. Yes.

Q. What do you observe?

A. The dates after Mr. Sanfilippo's signature and the date after—

The Court: I didn't get that. Will you read it, Mr. Reporter?

(Answer read as above recorded.)

A. (Continuing) Dr. Palermo, being 3/14/51 in both cases.

Q. The dates you have just read is from the original return that is in evidence that was filed with the Department of Internal Revenue?

A. Yes.

[fol. 353] Q. And they are March 14, the day after the March 13 set forth on Exhibit YY?

A. Yes.

Q. Now going back to Exhibit YY, which is the first page of the 1950 retained copy, do you observe on line 5 where it says: "Enter your tax from table on page 4, or

from line 18, page 3"—do you observe a figure on that line of 5,507.48?

A. Yes.

Q. Is any portion of that figure in your handwriting?

A. No.

Q. Then will you look down at the figure 1300 in line 6(b) in the little box. In whose handwriting is that?

A. Mine.

Q. And then over on the righthand side on the same line do you see the figure 1300 again?

A. Yes.

Q. And is that yours?

A. Yes.

Q. Then in line 7 do you observe the figure 4,207.48?

A. Yes.

Q. Is any of that in your handwriting?

A. No.

Q. Well, let us look at the declaration. Now I show you Exhibit CCC in evidence, the declaration of estimated tax for 1951. What was the practice, Miss Artino, with respect to making out the declarations of estimated tax?

A. To figure approximately 80 per cent or over of the current year's tax.

Q. I am thinking at the moment of the question of timing rather than the amount. At what time did you make the declaration of estimated tax?

A. At the same time the individual return was completed for that period that was being filed for.

* * * * *

Q. Miss Artino, look at line one in the declaration, Exhibit CCC. Do you see the figures "6417.48"?

A. Yes.

Q. From what source did you get that figure?

A. From line 7 of page 1 of the individual tax return [fol. 354] Q. The individual tax return is Exhibit YY?

A. Yes. Excuse me.

Q. Yes?

A. I would get that from line five.

Q. You say you got your figure 6,417.48 from line five of Exhibit YY?

A. Yes.

Q. Is that right?

A. Yes.

Q. And looking at the date on Exhibit YY and examining Exhibit CCC, would you tell the jury when you arrived at that figure of \$6,417.48?

A. The date was March 13, 1951.

Q. The tax finally computed on Exhibit YY as it now is, is in the amount of \$5,507.48. Did you have anything to do with reducing the amount of the tax by roughly 850 to 900 dollars?

A. No, it is not my writing.

Q. Do you recall ever getting any information or figures from the doctor in connection with his tax returns at any time?

A. No.

Q. Do you have Exhibit T-7A before you?

A. Yes.

Q. It is the work sheet entitled "Stock Transactions Fox, O'Hara." Do you observe that it sets up purchases and sales and profits and losses thereon?

A. Yes.

Q. Would you look at the item involving Minneapolis-Moline?

A. Yes.

Q. Do you see that one, 200 shares Minneapolis-Moline?

A. Yes.

Q. August 21, 1950, \$2,633; do you see that?

A. Yes.

Q. Then it says "Error should be one-half," and then 100 shares, and the sale date—what is that? What is the sale date? I can't see it on my photostat.

A. 12/22/50.

Q. Well, Miss Artino, if an error was made as to this item, who made it?

A. I did.

[fol. 355] Q. Did anyone tell you to make it?

A. No, it was just an error on my part.

Mr. Newcomb:

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May we now hand to the jury Exhibits T-7-C, being a recap of checks, January to December 1950, and T-7-D, being a list of deposits for that year, both already being in evidence.

By Mr. Newcomb:

Q. Miss Artino, I show you Exhibits T-7-C and T-7-D and ask you in whose handwriting they are?

A. Mine.

Q. On looking at T-7-D, it is entitled "Deposits." I ask you on whose instructions, if you recall, you did this work?

A. I don't recall specifically who told me.

Q. Well, did you do it on your own initiative?

A. No.

Q. According to the practices of the Sanfilippo office in the years that you were there, was it the practice in working on one year's return to get out the file for the previous year?

A. Yes.

Q. And for the clerks to set up on the basis of the previous year's files the same type of worksheets that were in the previous year?

A. Yes.

Q. And, of course, you also did whatever you were told to do?

A. Yes.

Q. Is it accurate to say that you either set this up on the basis of what was in the previous year's files or because you were instructed to do so by one of your superiors?

A. Yes.

Q. Now, is the same true of Exhibit T-7-C, which is the recap of checks?

A. Yes.

.

[fol. 356] Q. I call your attention to the numeral 66 in that position in that section of the worksheet and ask you to explain it.

A. Well, it is evident I started to add it and never finished it. Now I don't recall why I never finished it.

Q. Miss Artino, would you in your own words describe to the jury the conditions which existed in the Sanfilippo office during the tax season. How many people worked there, what hours did they work, and so forth?

Mr. McHugh: If your Honor please, I am going to object unless that is restricted to some definite period and some definite year.

Q. Were you there in 1949?

A. Yes; I was.

Q. Approximately how many people were employed by the firm at that time?

A. Possibly 12 or more.

Q. How many rooms were there in the office?

A. There were three rooms. One was sublet.

Q. Sublet to whom? Do you remember the gentleman's name?

A. Mr. Rosenbaum.

Q. During ordinary business hours did the Sanfilippo people use that room, Mr. Rosenbaum's room?

A. Occasionally.

Q. Did they also use it at night?

A. Yes.

Q. During the tax season in 1949 who worked on tax returns in the office? We don't need names. About how many of the people?

A. I would say about 12.

Q. Were there any exceptions that you recall?

A. Yes.

Q. Were any of the members of the staff, including yourself, required to work sometimes in the evenings?

A. Yes.

Q. In connection with the preparation of tax returns in 1949 do you recall whether Mr. Rosenbaum's room was used at all during the daytime?

A. I can't tell you for sure but I can just tell you what had happened.

[fol. 357] Q. All right. When did the heavy work in the tax season start? Do you remember about when?

A. I would say the beginning of March—I am sorry, February.

Q. Beginning of February?

A. Yes.

Q. Who prepared returns during the tax season?

A. I did.

Q. Who else?

A. All the accountants.

Q. And who else?

A. I believe there was somebody else in the office who also prepared these tax returns.

Q. I can't hear you. What?

A. I believe there was somebody else in the office who prepared these tax returns.

Q. Who was that?

A. Another girl.

.

Q. During 1949 did you have a chief file clerk or anyone in charge of the files?

A. Mrs. Fanelli took care of the files.

Q. Alone?

A. No, we all chipped in at times.

Q. Pardon?

A. We all chipped in at times.

Q. Were there files also in these rooms?

A. Yes.

Q. How many file cabinets would you say there were? How many file cabinets were there, as far as you can recall?

A. We had one file in which we kept the current work papers and current tax returns, and then we had cabinets and other files which were for work that was done earlier, earlier years.

Q. Did you have any responsibility in 1949 for keeping track of files, as to what was in the files or not in them?

A. I don't understand what you mean. You mean account for every piece of paper?

Q. Yes.

A. No, I didn't.

Q. Did you at any time have such responsibility?

A. No.

Q. Did anyone in the office at any time have any such responsibility from your observation?

A. Just generally, on a general basis, we had to file the [fol. 358] papers and work sheets and tax returns, but we didn't have to account for every piece of paper.

Q. In the normal course, going back to the practices of your office, what was your practice and the office practice with respect to checking the contents of files when you started to prepare returns?

A. There wasn't any.

Q. Going back to working conditions in 1949, were there times when there were as many as twelve people in those three rooms all working at the same time?

A. There could have been, yes.

Q. Do you have any recollection whatever as to the circumstances under which nothing further was done with Schedule T-7C?

A. No, I don't.

Q. Do you have any recollection whatever as to the circumstances under which nothing further was done with Exhibit T-7D?

A. No.

Q. Without referring to the exact exhibit numbers, do you have any recollection whatever as to the circumstances under which nothing further was done with the Rosina Palermo schedules that we went over this morning?

A. No.

Q. Limit yourself to the calendar year 1950 and the tax year 1949 and tell us, do you know what was done with incompleting work at the end of the day?

A. Yes.

Q. Would you tell the jury?

A. We set up different sections of piles of papers according to how far the work had been completed, and

another pile of papers would be incomplete work papers, and another pile would be ready for tax returns, and another pile would be or had to be schedules, and another one for computation check, and another one for typing, and finally one for typing check.

[fol. 359] Q. I am sorry, I did not get that last one.

A. Typing check, typing to be checked.

Q. Typing of returns to be checked?

A. Yes.

Q. Who assigned the work in 1950 in connection with the 1949 returns?

A. Who was in charge do you mean?

Q. Well, I will be more specific. Will you look at T-7A in evidence, which is the spread sheet for the stock transactions and the work mostly was done by someone else but you made some entries on it. Who told you to do that and who assigned the job to you?

A. I can't recall specifically who told me.

Q. Now, what was the office practice in respect to the assignment of personnel?

A. As to what each had to work on?

Q. Yes.

The Court: Keep your voice up, please.

A. Well, if you had time you worked on it, at anything that had not been up to date.

Q. In addition to that, who was your boss for these years, or bosses?

A. Well, Mr. Sanfilippo, I believe, had the final word on everything.

Q. Sometimes your immediate boss was not the fellow with the final word. From whom else did you take orders and instructions during those years?

A. You are talking now of 1951?

Q. Yes.

The Court: Take it a year at a time.

Q. In 1951 in connection with the 1950 return.

A. Mr. Amoruso also would give me instructions.

[fol. 360] Q. And anyone else?

A. Occasionally Mr. Barranco.

Q. Anyone else?

A. No.

Q. Let us take the tax year 1950 and the calendar year 1951. During that period did you observe any control system, card index system, or other system, for keeping track of what was in the files?

A. We had no control of what was in the files.

Q. Did you at any time that you were there observe anything like that?

A. No, sir.

Q. Miss Artino, let us look, please, at Exhibit T-7C, recap of checks. Do you observe on this recap of checks there is a heading entitled "SPPL", the second major column from the right-hand side; do you see that?

A. Yes.

Q. And another one entitled "L&P"; is that right?

A. Yes.

Q. What does "L&P" stand for?

A. Light and power.

Q. Would you look at the items on T-7C for supplies and light and power? Just scan that briefly and then look at the total on Exhibit AAA, which is Schedule C annexed to the return. Do you observe that they are different, that the total on Exhibit AAA, which is the return, is \$210.83?

A. That's right.

Q. And your recap of checks, Exhibit T-7C has only five items; do you see that?

A. Yes.

Q. Obviously it does not total \$210.

A. No.

Q. Do you have any recollection whatever of the circumstances under which you used the amount of \$210.83 in the return as against the light and power items on the work sheet?

A. No specific recollection.

Q. Keep your voice up.

A. No specific recollection except that there must have been—

Q. Keep your voice up.

A. —there must have been some work sheet or memorandum sheet where I picked up those figures.

[fol. 361] Q. Do you have any recollection of anyone talking to you about the exhibit, that is, Exhibit T-7C?

A. From the office?

Q. Yes.

A. No.

Q. Or anyone outside the office?

A. No.

Q. Miss Artino, I show you Exhibit T-7C, which is a schedule of stock transactions for 1950 and ask you if you recognize the handwriting of the main body of the schedule.

A. Yes.

Q. Whose is it?

A. That is Mr. Phil Caputo's.

Q. Do you see any handwriting on this page of your own?

A. Yes. Excuse me, I think I have previously identified this as Mr. Barranco's.

A. I believe I had previously identified it as Mr. Barranco's but now that I see it again it appears to be Mr. Caputo's.

Q. Do you see over here at the right-hand side the figure \$4,000 "additional div,"—is that in your handwriting?

A. Yes.

Q. Do you know where you got that figure from?

A. As I said, either from the work sheets or it was given to me.

Q. Was it given to you by Dr. Palermo?

A. No.

Q. You got it from someone in the office?

A. Yes.

Q. Miss Artino, I show you an envelope which has been marked Exhibit KKK, being an envelope of the National City Bank postmarked February 1, 1951. Do you observe notations in pencil on the outside of this envelope?

A. Yes.

Q. Can you tell us in whose handwriting they are?

A. No, but I think the "51" might be mine. The other I don't know.

Q. So the record may be clear, there is the word "Jan" and next to it is "51" and underneath that there is "Feb" [fol. 362] and an apostrophe and "51"?

A. I am referring to the second "51".

Q. You said it might be. What do you think it is?

A. Well, I think it is my handwriting.

Q. Now I show you Exhibit L, which is another bank envelope of the National City Bank postmarked April 3, 1951. Is there a notation on that one?

A. Yes.

Q. In whose handwriting is that?

A. Mine.

Q. And the "Mar" for March and the "51" are in your handwriting?

A. Yes.

Q. And you left the firm in the fall of 1951?

A. Yes.

Mr. Newcomb: I offer the envelope in evidence.

(Defendant's Exhibit LLL for identification received in evidence.)

Q. I show you Defendant's Exhibit MMM, being the envelope of the National City Bank—can you read that?

A. May 2, 1951.

Q. Postmarked May 2, 1951, and ask you if there is anything on that envelope in your handwriting?

A. Yes.

Q. And what is in your handwriting?

A. The abbreviation for the month of April and the figure "51".

(Defendant's Exhibit MMM for identification received in evidence.)

Q. I now show you a National City Bank envelope postmarked July 3, 1951 and ask you if there is any handwriting on that one in your hand?

A. Yes.

Q. What is in your hand?

A. The date and 1951. June.

[fel. 363] (Defendant's Exhibit OOO for identification received in evidence.)

Q. I show you Defendant's Exhibit PPP for identification, being a National City Bank envelope postmarked—

A. August 2, 1951.

Q. —and ask you if anything on that envelope is in your handwriting?

A. Yes.

Q. What is in your handwriting?

A. The abbreviation for July and the year '51.

(Defendant's Exhibit PPP for identification received in evidence.)

Q. I show you Defendant's Exhibit QQQ for identification and ask you if anything on that one is in your handwriting?

A. The "51" might be.

Q. Well, you say the "51" might be. What do you think about it?

A. It looks like mine.

Q. Do you think the "Aug" for August is not yours?

A. No.

Q. Is that right?

A. That is right.

Mr. Newcomb: I offer it in evidence.

Q. By the way, for the record, it is the National City Bank statement envelope postmarked what date?

A. September 5, 1951.

(Defendant's Exhibit QQQ for identification received in evidence.)

Q. You left in the fall of 1951?

A. Yes.

Q. I show you, Miss Artino, Defendant's Exhibit UUU, a letter from the National City Bank, an envelope post-[fol. 364] marked January 1952, and ask you if you can recognize the handwriting on it.

A. Yes.

Q. In whose handwriting are the words "Dec." for December and "1951"?

A. Mr. Sanfilippo's.

Q. Miss Artino, I show you Defendant's Exhibit I-4 in evidence and ask you if you recognize the handwriting in the penciled portion which is enclosed in the circle.

A. Yes.

Q. Whose handwriting is it?

A. The word "figures" appears to be Mr. Sanfilippo's, and I can't make out the rest.

Q. Did you in the years that you were there see the defendant Dr. Palermo in the Sanfilippo office?

A. No.

Q. During the years when you worked on the returns of the doctor did you know the significance of a "long" position in a brokerage account?

A. No.

Q. In Exhibit T-7C, do you observe—

Mr. McHugh: May I see what that exhibit is?

Mr. Newcomb: That is the recap of checks in 1950.

Q. Do you observe on the left-hand side, the extreme left-hand side of the page, the names written in?

A. Yes.

Q. Are they in your handwriting?

A. Yes.

Q. And then do you see anything there for Fox, or Fox, O'Hara?

A. I see O'Hara.

Q. What does that refer to?

A. I don't recall at this time.

Q. Does that refer to Fox, O'Hara?

A. Very likely.

Q. Do you recall making any effort to total up the checks to any of these people like National City or Fox, O'Hara?

A. You mean picking out the items and making a separate schedule?

[fol. 365] Q. Yes.

A. No, I don't recall.

Q. Do you recall discussing with anyone in the office what the items meant or what work should be done with respect to them?

A. I might have; I don't recall if I did or not.

PHILIP CAPUTO, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Newcomb:

Q. Mr. Caputo, what is your occupation?

A. I am an accountant, sir.

Q. And by whom are you employed?

A. Anton Noll Metals.

Q. Company or—

A. It is an individual, no company.

Q. Were you at one time employed by the accounting firm of Arthur S. Sanfilippo & Company?

A. Yes, sir.

Q. Approximately when did you begin your employment with them?

A. I started in July of 1949.

Q. Did you graduate from college?

A. I graduated from college in September of 1949. I finished—I needed two courses for my degree and I finished them up in the summer of 1949, in the evening.

Q. And you finished them while you were still working with the Sanfilippo firm?

A. Yes, sir.

Q. I show you what has been marked Defendant's Exhibit T-7B, being a worksheet of stock transactions for the tax year 1950 and ask you if any of it is in your handwriting.

A. Yes.

Q. You do not need to identify it all. I will ask you some general questions first and then we will go into the details.

Mr. Caputo, at the time you did that worksheet, did you have any prior experience with the preparation of tax returns involving substantial stock market trading?

A. No.

[fol. 366] Q. Did you at that time, at the time you did that worksheet, have any knowledge or understanding of the significance of a "long" position appearing in a brokerage account?

A. No, sir.

Q. Did you know, for example, what was the significance or meaning of an entry in a brokerage account of sell 100 shares received in the account? Do you know anything about that?

A. Just received in the account?

Q. Do you know what that would indicate?

A. You mean whether it was purchased or sold?

Q. I am asking you if you know.

A. I don't understand your question.

Q. Mr. Caputo, I show you Defendant's Exhibit BB for identification, which appears to be the customer's copies of the brokerage account already in evidence. Would you look at Exhibit T-7B; which is the 7-column original entitled "Dr. A. M. Palermo, stock transactions Fox, O'Hara." Do you see that?

A. Yes, sir.

Q. Is the heading in your handwriting?

A. Yes, sir.

Q. Is it all in your handwriting with the exception of some matter down on the right-hand side?

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A. Yes, sir.

Q. Can you recall who told you to do this work?

A. Carrie Artino told me to work on this schedule.

Q. And who explained the schedule to you? Do you have an independent recollection of that?

A. No, I don't recall who explained it to me but—this particular page?

Q. Yes, T-7B.

A. No, I made up this schedule myself. I was told what to pick up on the statements and I made this schedule myself.

Q. Can you tell the jury what you were told to do? Limit yourself to T-7B.

A. Well, on T-7B I was told to recap the dividend income for the year 1950, and I was told to recap the interest expense or the interest paid to the brokers by Mr. Palermo for that year.

[fol. 367] Q. Mr. Caputo, when you went to work on this material do you recall whether or not you had all the brokerage statements before you at the beginning?

A. No, I didn't have all the statements when I started.

Q. Do you know how many statements, or do you recall how many statements you did have, if you recall?

A. Yes, I recall that I had all but the March and April, the statements that were missing, which is the March and April one, for the months of March and April.

Q. Then in what order, looking at Exhibit T-7B, did you put the interest items originally? Which of those items did you enter first on Exhibit T-7B?

A. I entered first the \$122.87, the third item from the top.

Q. And then?

A. I went right down the line.

Q. Through to—

A. \$317.78.

Q. Yes.

A. And then at a later date when I got the statement that was missing I filled in the items that I hadn't already included.

Q. You put them where?

A. Well, I put them on the top of the list.

Q. Mr. Caputo, in evidence now as a part of Defendant's Exhibit BB is the duplicate statement for the period covered by that sheet. Would you tell me when it begins?

A. Pardon me?

Q. For what period is that duplicate statement?

A. It starts February 28th and it gives the long position—it is the month of April.

Q. Do you have any independent recollection of what you did in order to get that sheet?

A. I asked Carrie when I first set up the job, there was one statement missing, I did what I could, and I asked Carrie to get me the missing statement. So evidently she called up Fox, O'Hara—

[fol. 368] Q. Well, I am sorry. We are only asking what you did.

A. I asked her to get me the duplicate statement.

Q. And she did or somebody—

A. And somebody, probably she did it or somebody did it.

Q. Mr. Caputo, do you see on the first page of Defendant's Exhibit BB before you a Radio Corporation of America dividend in the amount of \$2,050?

A. Yes, sir.

Q. According to the evidence here, that dividend was omitted from the worksheet, which is Exhibit T-7B, and from the defendant's return. Do you recall going over the brokerage statements and worksheets with us?

A. Yes, sir.

Q. Do you have any recollection of how that dividend was omitted?

A. No, sir.

Q. Did anybody tell you to omit it?

A. No, sir.

Q. Am I not correct, then, Mr. Caputo, that the \$150 Stewart-Warner dividend which is on the January page you entered in your worksheet?

A. Yes.

Q. Whereas the \$2050 item also on the same page you did not enter into your worksheet?

A. That is right.

Q. Would you now look at Exhibit T-7-A, the 14-column spread sheet?

A. Yes?

Q. And do you see the phrase back there—let me call your attention to that one again, “prior to 4/1/49.”

A. That is mine.

Q. Will you tell the jury what occurred or what had occurred when you wrote that?

A. As I picked up the sales of the stocks and tried to compute the profit or loss, I didn't have the cost of these particular stocks, the Zenith Radio Company stock, and I only had the statements as far back as April 1st of 1949, and I could not locate the cost price of the Zenith Radio stock; so I made this note to show that that must have been purchased prior to April 1st of 1949, and that some—[fol. 369] body would have to get the information from previous statements that were not in the office at that time anyway.

Q. Well then, are the figures under the heading “Cost” next to the item you are talking about—are they in your handwriting or not?

A. I think they—that is mine.

Q. Well, did you do this in two steps?

A. Yes. At a later date someone must have given me these figures and I filled them in where it applied and then completed it.

Q. Would you look with me at Exhibit BB, and I will turn to the page for November. Do you see an item there reading as follows under the date November 21—do you see entries under the column “Bought or Received” 100 shares of Eversharp, and then, a second one of Eversharp, and then do you see the entry opposite the second one “From Cash A/C Reed”? Do you see that?

A. Yes.

Q. At the time you worked on this did you know what that meant or what an item of that kind meant?

A. No.

Q. Did you inquire of anyone as to where was the Doctor's cash account?

A. No.

Q. On the next page, in December, there is an item of 100 shares of International Tel & Tel, Foreign Securities Delivered, and 100 shares of Domestic Received. Did you inquire of anyone as to what that item meant?

A. I don't remember about that particular item.

Q. Keep your voice up.

A. I don't remember about that particular item.

Q. And above it J. I. Case, 50 shares A/C S/D. Did you know what that was?

A. No.

Q. Do you know now?

A. Yes—

Q. It is a stock dividend—

Mr. McHugh: Pardon me—

Mr. Newcomb: Will you keep your voice up even though I am standing beside you. The jury has to hear.

[fol. 370] A. This particular item—did I ask anybody about it?

Q. Well, I will ask you that.

A. No.

Q. Did anyone tell you of the existence of a cash account of the Doctor's that you recall?

A. No. The only thing, I knew that he had additional income, dividend income that I was not concerned with.

Q. And that you got from what source?

A. Carrie.

Q. And are you talking about this additional 4000 on here?

A. Yes, sir.

EDWARD SHELTON, called as a witness in behalf of the defendant, having been first duly sworn, testified as follows:

Direct examination.

By Mr. Newcomb:

Q. Mr. Shelton, you have testified here previously. Are you employed by the brokerage firm of Newburger, Loeb & Company?

A. I am.

Q. Was there a time when you were employed by the brokerage firm of Fox, O'Hara & Company?

A. That's right.

Q. About when did you start to work with Fox, O'Hara?

A. June of 1929.

Q. And were you with Fox, O'Hara continuously there after until you moved over to Newburger, Loeb?

A. With the exception of four of the war years, World War II.

Q. When you were in service, is that right?

A. Yes, that's right.

Q. Approximately when did you transfer from Fox, O'Hara to Newburger, Loeb?

A. January 2, 1952.

Q. While you were with Fox, O'Hara did they have any brokerage office in Phoenix, Arizona?

A. No, sir.

[fol. 371] Q. Did Newburger, Loeb or does Newburger, Loeb have any office in Phoenix, Arizona?

A. No, sir.

Q. Did Fox, O'Hara have any office in San Francisco?

A. No, sir.

Q. Or Los Angeles?

A. No, sir.

Q. Did Newburger, Loeb have any office in San Francisco or Los Angeles?

A. No, sir.

Q. And did there come a time when you had charge of Dr. Palermo's account with Fox, O'Hara?

A. Yes, I serviced his account from 1946 until the end of 1951.

Q. With Fox, O'Hara?

A. With Fox, O'Hara.

Q. And when you went with Newburger, Loeb did you continue to function with respect to Dr. Palermo's account?

A. Yes.

Q. Did he have a margin account and a cash account with both firms?

A. Yes, sir.

Q. Do you recall a Fox, O'Hara account in the name of Rosina Palermo?

A. Yes, sir.

Q. Did you function with respect to that account?

A. Yes, sir.

Q. Do you recall a Fox, O'Hara account in the name of Frances Pollaci?

A. Yes, sir.

Q. One of the defendant's sisters?

A. Yes, sir.

Q. And did you function with respect to that account?

A. Yes, sir.

Q. In connection with the margin account of Dr. Palermo at Fox, O'Hara, from whom did you receive your instructions?

A. From Dr. Palermo.

Q. With respect to the cash account of Dr. Palermo at Fox, O'Hara, from whom did you receive your instructions?

A. From Dr. Palermo.

Q. With respect to the cash and margin accounts of Dr. Palermo at Newburger, Loeb, from whom did you receive your instructions?

A. From Dr. Palermo.

Q. With respect to the Rosina Palermo account at Fox, O'Hara, from whom did you receive your instructions?

[fol. 372] A. In most cases from the doctor, but not in all; in some cases from Mrs. Pollaci herself.

Q. My question, Mr. Shelton, related to Rosina Palermo.

A. Oh, I am sorry; I thought you meant Frances—from Dr. Palermo.

Q. So that the record may be clear, is it your testi-

mony that instructions with respect to the Rosina Palermo account came to you from the doctor?

A. That's right.

Q. As to whether to buy and sell and so forth?

A. That's right.

Q. With respect to the Frances Pollaci account, from whom did you receive your instructions?

A. From the doctor in most instances, but not in all. I would get orders directly from Mrs. Pollaci on occasion over the telephone.

Q. Mr. Shelton, do you recall receiving instructions from Dr. Palermo as to how to handle dividends received in his margin account, and, if so, what were they?

A. The checks would be given to the doctor. He would withdraw all of his dividends and the checks would be sent to the doctor, in most cases at our office, by messenger.

Q. For example, I show you Government's Exhibit 78, which is a page from the margin account of the doctor in 1951. Do you see that there is recorded therein the receipt of a dividend of \$150 from Stewart-Warner under date of January 9th, and then a check for \$150 under date of January 10th? Do you see that?

A. Yes.

Q. To whom was that check drawn?

A. To the order of Dr. Palermo.

Q. And then right under it is the RCA dividend of \$2050 on 4100 Radio Corporation, and right underneath it is another check of \$2,050. Do you see that?

A. That's right.

Q. To whose order was that check drawn?

A. To the doctor's.

[fol. 373] Q. Was that his regular practice with respect to dividends in the margin account?

A. Yes, sir.

Q. During all the time that you serviced his account?

A. Yes, sir.

Q. I think you said something about a messenger. How were these checks delivered to the doctor?

A. In our office.

Q. By hand?

A. Yes. The check would be given to me and I would hand it to the doctor when he came in.

Q. Did the doctor sometimes endorse the checks and give them right back to you?

A. Yes, sir.

Q. With instructions to do what?

A. Usually to buy some more stock.

Q. Well, to credit them to his account?

A. That's right.

Q. Does that practice of the doctor, to your knowledge, go back for many, many years?

A. Yes.

Q. From recollection, if you can, how long does it go back?

A. I couldn't say the number of years, but it seems to me it is as long as I have been servicing his account.

Q. In the case of dividends received in the Rosina Palermo account, did the doctor ever give you any instructions as to how they should be handled?

A. Yes, those checks were taken out too.

Q. I am sorry. Will you speak a little louder?

A. Her dividend checks were sent to her.

Q. Were sent to whom?

A. To our office. I say "her," because the check would be drawn to her but the checks were usually sent to our office just as the doctor's checks were.

Q. Did you have a downtown office?

A. Yes. All checks were drawn by our downtown office. We were merely a branch office and all we did was execute orders and naturally we kept no books or anything.

Q. The checks were drawn down at the main office?

A. And sent to our 86th Street office.

[fol. 374] Q. And there you would deliver them to whom?

A. To Dr. Palermo.

Q. And was that true of the checks in the Rosina Palermo account?

A. Yes.

Q. Did the defendant, so far as you can recall, in 1948 ever call upon you to produce for him or supply him with

information as to dividend records, assets and liabilities, balance sheets or the like, of corporations?

A. No, sir.

Q. Did the defendant ever ask you to make for him a study of any particular corporation?

A. No, sir.

Q. Did the defendant ask your advice as to whether to purchase or sell a stock of any particular corporation?

A. No, sir.

Q. During the years that you serviced his account do you recall whether the defendant specialized in any particular type of stock?

A. By type do you mean any particular industry or do you mean type as investment versus speculation, speculative issues?

Q. Well, I am trying to get at what if anything you observed in connection with his buying and selling—

* * * * *

Do you recall at any time his asking you to supply information, statistical data, past records or history as to any particular industry?

A. No, sir.

Q. I would like to cover both buying and selling. Did he ask you to advise him from time to time as to what he ought to sell?

A. No, sir. He never asked me anything. He would just say "Buy this and sell that," and that is the end of it.

Q. Did the defendant ever discuss with you the amount of interest or the interest rate that was being charged to him?

A. I have never heard him ask me that.

[fol. 375] Q. Did that interest rate vary?

A. Oh, yes. Money rates change with banks, call money rates. We would adjust accordingly. If money went up we would increase our rate, and if it were down we would lower our rate. It is generally in a good account about half per cent above current call money rates.

Q. In other words, a broker with a good account charges half a per cent above?

A. He must charge a half per cent above the current call money rate.

Q. You say he must charge that?

A. Yes. It is a stock exchange regulation.

Q. Mr. Shelton, do you recall receiving telephone calls from the Sanfilippo accounting office?

A. Yes, sir.

Q. Did you receive such calls while you were with Fox, O'Hara?

A. Yes, sir.

Q. Did you receive them from time to time?

A. Yes, sir.

Q. In different years?

A. Yes, sir.

Q. You left Fox, O'Hara early in 1952 or late in 1952?

A. My resignation was effective December 31, 1951.

Q. How frequently would you receive such calls, and at what time of the year, if you remember?

A. Well, it was usually in the early part of the year, prior to the filing of the income tax returns, and I would say almost every year.

Q. Now tell us what the subject matters of some of these calls were, that you remember?

A. They usually wanted to know what certain corporations paid in dividends for the previous year.

Q. Do you remember any particular person to whom you spoke?

A. By name? It was usually a woman, a girl.

Q. But you don't know by name?

A. No, I never asked.

Q. Did you receive any such calls after the time you went with Newburger, Loeb?

A. Yes.

[fol. 376] Mr. Newcomb: May I have the 1951 brokerage statement, Defendant's Exhibit BB?

(Brokerage statement handed to Mr. Newcomb.)

Q. Mr. Shelton, did your firm upon occasion supply duplicate statements to its customers?

A. Yes.

Q. Under what circumstances would you do that?

A. Upon a request from the customer.

Q. In connection with these telephone calls from the Sanfilippo office, was there any occasion on which Dr. Palermo told you not to supply them the information?

A. No, sir.

FRANCES POLLACI, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Newcomb:

Q. Are you related to the defendant, Dr. Palermo?

A. I am his sister.

Q. Where do you live?

A. 408 West 145.

Q. And how long have you lived there?

A. Going on 40 years.

Q. What is the name of your mother?

A. Rosina Palermo.

Q. When did she die?

A. May 15, 1957.

Q. How old was she then?

A. Going on 82.

Q. Did she live at 408 West 145th Street?

A. Yes. I have lived with her all my life.

Q. Do you remember approximately what year it was that you moved there?

A. 1917.

Q. Was your father alive then?

A. Yes, sir.

Q. Did that become the family home?

A. What's that?

[fol. 377] Q. Did that become the family home?

A. Oh, yes.

Q. At that time?

A. Yes.

Q. And has been ever since?

A. Yes, sir.

Q. When did your father die?

A. June 10, 1940.

Q. After that time did your mother continue to live at 408 West 145th Street?

A. Yes, sir.

Q. Who took care of her?

A. My brother and I.

Q. Did you do the housework and so forth?

A. I did everything for my brother and for my mother. I took over the general household.

Q. And do you have children?

A. I have four boys.

Q. Who provides the money to take care of your family?

A. My brother, Dr. Palermo.

Q. Who owned the house at 408 West 145th Street?

A. My mother did and she gave it to my brother.

Q. And after that who paid for its maintenance and upkeep?

A. Dr. Palermo, my brother.

Q. And for the fuel, heat, light, power and other expenses?

A. He paid all the expenses of the house.

Q. Did your mother have any education?

A. No.

Q. During her lifetime could she read or write English?

A. No.

Q. Did she learn to sign her name?

A. Yes, but very—you know, that foreign handwriting, letter after letter, you know, not as fast.

Q. Did your mother suffer from diabetes?

A. Yes, sir.

Q. For how long before she died did your mother suffer from diabetes?

A. She suffered from a broken hip; she fell down about four or five years ago and was confined to bed about nine months.

Q. I am talking about this other thing.

A. Diabetes, yes.

[fol. 378] Q. How far back does that go?

A. Well, she had diabetes about 30 or 35 years.

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Q. Prior to the time that your mother broke her hip did her actions appear to be rational or irrational?

A. Irrational; she got worse after she broke her hip; the shock must have hurt her.

Q. Will you describe her physical condition after she broke her hip?

A. Well, she didn't remember things; she would be very demanding; she didn't know half the time what she was doing as a senai person would.

Mr. McHugh: I am sorry, I did not get that.

Q. That is a word that I didn't catch, Mrs. Pollaci.

A. I said she would do things that a senai person would. She didn't know.

The Court: Do you mean a sane person?

The Witness: As a senai person—

The Court: Would you spell "senai" for us?

The Witness: I think it is s-e-n-a-i, isn't it? I am not a doctor, after all. I know that the doctors all claim she didn't know what she was doing and she wasn't to blame. Her condition brought it on. She broke her hip and she got worse, because when she broke her hip she was mostly unconscious.

Q. You say she died May 16, 1957?

A. Yes.

Q. Was she in ill health prior to her death?

A. Oh, yes, she was in bed for two years and we had nurses, night and day, continually.

Q. And who paid for that?

A. My brother.

Q. So far as you know, other than yourself and your brother, the Doctor, did anyone else care for her or contribute to the support of your mother?

A. No, sir.

[fol. 379] Q. What is that?

A. No, sir. She was taken to the hospital twice, once with a heart attack and once with a diabetic attack and she was very bad, and my brother paid for day and night nurses, and for day and night nurses for the last couple of years of her life.

Q. Mrs. Pollaci, in 1945 did your brother establish a brokerage account for you?

A. Yes, sir.

Q. With what brokerage firm?

A. I believe at that time it was Fox, O'Hara.

Q. Thereafter did the account continue?

A. Yes, sir.

Q. Who managed the account?

Q. Mrs. Pollaci, you were talking about the margin account with Fox, O'Hara?

A. Yes, sir.

Q. Who managed that account?

A. My brother.

Q. Did the account continue from 1945 until 1952?

A. Right.

Q. Mrs. Pollaci, did your brother during any of the years 1945 to 1951, inclusive, maintain a margin account with Fox, O'Hara in the name of your mother?

A. A few stocks; I don't know what they were; it wasn't much.

Q. Did you on occasion hear your mother and your brother discussing that account?

Mrs. Pollaci, I did not ask you what the discussion was, but I am asking you simply whether from time to time you heard your brother and your mother talking about her account?

A. Well, my mother saw that I had some—

Q. Pardon me?

A. Yes.

Mr. McHugh: May we have the time fixed, if your Honor please?

[fol. 380] Q. And did that occur from time to time—

The Court: Why don't you ask her when?

Q. And when did those discussions take place?

A. Well, when my brother used to come into the office she would say how did the stocks go—

The Court: No. When was the first discussion which you heard between your brother and your mother?

The Witness: Oh, I couldn't say. I really don't know. I couldn't say.

Q. How long ago?

A. Oh, quite a few years back.

Q. How frequently did you hear such discussions?

A. I don't know what you mean by discussions but I know my mother would say, "How did the stocks go?"

The Court: Never mind what she said.

Q. Mrs. Pollaci, you cannot say what your mother said or what the Doctor said. We are only trying to, and I am asking you, how frequently did you hear any mention of her account between the Doctor and your mother?

A. When he would come in and they went off together, I don't know, they would talk by themselves and I was up in the kitchen.

Q. How often did you hear them talking about the account or any mention of it? That is all I am interested in.

A. Oh, I couldn't tell you. It was on and off continually, because as soon as he would come in she would—

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[fol. 381] MARY R. POLLACI, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Newcomb:

Q. Mrs. Pollaci, where do you live?

A. 20 Cabrini Boulevard.

Q. And what is the name of your husband?

A. Joseph.

Q. And is he a brother of James Pollaci?

A. Yes.

Q. And you are a sister of Frances Pollaci?

A. That is right.

Q. Are you also a sister of the defendant?

A. Yes.

Q. Mrs. Pollaci, did there come a time when the defendant purchased some RCA stock in your name?

A. Yes.

Mr. Newcomb: Speak up. I am sorry, we can't hear you.
The Witness: Yes.

Q. Can you tell us approximately when that was?

A. No.

Q. Well, was it a number of years ago?

A. Yes.

Q. And without telling what your brother said, did he speak to you about it?

A. What do you mean?

Q. Well, did you know about it?

A. After he bought them?

Q. Yes.

A. Yes.

Q. Then did dividends come in on the stock to you?

A. Yes.

Q. And what did you do with them?

A. I turned them over to my brother.

• • • • •

Q. Now, you say that you did receive dividend checks on this stock?

A. Yes.

[fol. 382] Q. And those you turned over to your brother?

A. Yes.

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Q. Now, did you from time to time receive money from your brother?

A. Yes.

• • • • •

Q. Without regard to the exact year at the moment but with reference to the purchase of this stock, did you thereafter receive money from your brother from time to time?

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A. Yes.

Q. And did that continue from year to year and from time to time?

A. On and off, yes.

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Q. Do you have any recollection of how much money you received in any given year?

A. Any given year?

Q. Yes, in any particular year?

A. Not a particular year, but I can tell you at the times that he has given me money but I would not remember exactly what year that would be.

Q. How many transactions of this nature were there?

A. Several.

Q. Within a period of a year?

A. Yes.

Q. Were there occasions when you asked him for money?

A. Yes.

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Q. Have you at any time paid money to your brother?

A. No.

Q. Over the period subsequent to the purchase of this stock can you tell us approximately how much money you received from your brother?

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The Witness: Oh, anywhere about \$5,000, around that.
[fol. 383] Q. On one occasion did you obtain a loan from a bank?

A. Yes, I did.

Q. Did your brother act in that transaction? Don't say what he did.

A. Yes, he did. We took a loan—

Q. No. Now will you tell the jury about that transaction.

A. Yes. My husband went into business, and we didn't have enough cash. We paid for the business but we needed money to keep—

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Mr. Newcomb: Just what happened.

A. Well, we wouldn't afford to pay the loan and my brother heard of it and he went to the bank and he paid the rest of the loan for us.

Q. Was it in addition to the money you have previously described?

A. No.

Q. That is—

A. I mean, that is in addition. He had given me money before.

Q. You named a figure, I am simply trying to find out whether in that figure you included the loan transaction or you did not include it.

A. Oh, yes, it is part of the money in the transaction.

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Cross examination.

By Mr. Miller:

Q. Mrs. Pollaci, directing your attention to the purchase of RCA stock in your name, I believe you testified on direct examination that you did not recall when that occurred.

A. That is right.

Q. Were you asked by the defendant before he purchased the stock whether he could do so?

A. No.

Q. When did you find out about it?

A. After he had purchased them for me.

[fol. 384] Q. Now, since that time has your belief been that you owned the stock?

A. Yes.

Q. Do you feel today that you own that stock?

A. No, I don't.

Q. What is your belief as to that stock?

A. They were sold.

Q. Do you recall when they were sold?

A. No.

Q. Were you asked permission to sell them prior to the time they were sold?

A. No.

Q. When did you find out that they had been sold?

A. Well, when I saw the dividends didn't come in any

more, then I noticed that they either were sold—I asked him about it and he said they were sold.

Q. No permission had been asked of you prior to the time they were sold?

A. No.

Q. Did you receive any proceeds from the sale?

A. No.

Q. During the time that the stock—I am referring now to the RCA stock—was registered in your name, was it your belief that you owned those stocks?

A. Yes.

Q. On that subject do you recall being interviewed by the special agents of the Internal Revenue Service on November 3, 1955?

A. I remember being interviewed but I don't remember exactly when it was.

Q. Was it approximately two years ago?

A. I imagine so.

Q. Do you recall that you testified under oath at that time?

A. What is that?

Q. Do you recall that you testified under oath at that time?

A. Yes.

Q. And do you recall that you were questioned generally about this same block of RCA stock?

A. Yes.

Q. Do you recall at that time being asked the following question and giving the following answer:

“Q. Did you own the stock on which those dividends were paid?

A. I owned the stock but my brother bought them for me. [fol. 385] He bought them in my name, in other words.”?

A. That is right.

Q. That is the question you were asked and that is the answer you gave, is that correct?

A. I believe so.

Q. Now approximately two months ago do you recall being interviewed by me in my office in the United States Court House?

A. Yes.

Q. Do you recall that that occurred on Monday, November 4, 1957?

A. I remember being there but I don't remember the date.

Q. Do you recall that Agent Harper was present?

A. Yes.

Q. And do you recall that at that time I asked you whether you owned this block of RCA stock?

A. Yes.

Q. Do you recall that your answer to me at that time was "I did not own the stock but they were in my name"?

A. Yes.

Q. Was that statement true when you gave it?

A. Well, he bought them in my name, so naturally they would be mine. He had told me that if anything should happen to him they would be mine.

Q. I am now directing your attention to your belief as to whether or not you owned these stocks and two statements you have made about that belief in the past.

A. Well, I don't know which way you mean, owned the stocks. He bought them in my name. If you say by owning them, by purchasing them, no, because he purchased them for me in my name, and he had said to me that if anything happened to him today or tomorrow that they would be mine, so that is how I believed they were mine.

Q. Well, do you recall telling the special agents that you did own the stock and they had been purchased for you by your brother?

A. That is right.

Q. And was that true when you said it?

A. Yes.

[fol. 386] Q. And do you then recall telling me that you did not own the stock but they had been purchased in your name by your brother?

A. Yes—well, that is how I mean it. Now, he bought them in my name and he said to me that if today, tomorrow something happen to him, they would be mine. Now I don't know if you misinterpret me or I didn't understand you.

Q. At one time you stated you owned them and at another time you stated you did not own them, is that correct?

A. Well, yes, if that is the way you—

Q. All right—

Mr. Newcomb: May she finish her answer?

The Court: What were you going to say—"If that is the way you" what?

The Witness: That is the way I believed it, he bought them in my name; he paid for them, and he bought them in my name, and he said to me "If anything should happen to me today, tomorrow, they are yours."

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ANTHONY CHARLES DEGEORGE, recalled as a witness on behalf of the defendant, having been previously sworn, testified further as follows:

Direct examination.

By Mr. Newcomb:

Q. Mr. DeGeorge, you testified here on a previous occasion?

A. That is correct.

Q. Now would you please be kind enough to keep your voice up so the members of the jury may hear. What is your occupation?

A. I am an accountant.

Q. By whom are you employed?

A. Haskins & Sells.

Q. And how long have you been with Haskins & Sells?

A. A little over a year. 13 months.

[fol. 387] Q. Was there a time you were employed by the accounting of Arthur R. Sanfilippo & Company?

A. Yes.

Q. When you were first employed by them were you employed on a full-time basis?

A. No; a part-time basis.

Q. Were you at that time attending school?

A. I was.

Q. What school?

A. St. John's University.

Q. Can you tell us approximately when you first went to work for the Sanfilippo firm?

A. Early February of 1953.

Q. And were you employed on a weekly basis?

A. An hourly basis.

Q. How were you paid?

A. On an hourly basis, hours worked—

Q. What?

A. At the rate of \$1.25 an hour.

Q. How often were you paid?

A. Every week.

Q. I show you what have been marked Defendant's Exhibits V-7-A to V-7-G, inclusive, and ask you whether yesterday you and I examined these worksheets together?

A. Yes, we did.

Q. And you had seen them on previous occasions, had you?

A. Yes, I had.

Q. And can you identify them as being worksheets prepared at least in part by you when you were with the Sanfilippo firm?

A. Yes.

Q. Relating to the defendant's tax return for the year 1952?

A. That is correct.

Q. I would like to address myself first to the question of when you worked on those sheets in the Sanfilippo firm, and I ask you whether you can tell us of your own independent recollection when that was?

A. No, I don't know.

Q. Now let us see if we can refresh your recollection: I show you Defendant's Exhibit F-8 in evidence, which is the employment record of the Sanfilippo firm, and call your attention to your name on the page which is listed 1/2/53, [fol. 388] where it lists the employees, but then ask you to follow with me to see if I am not correct that you first received compensation for the week of February 6, 1953; do you see that?

A. Yes, sir.

Q. Did you work there at all when you were not being paid?

A. No.

Q. Now I show you a book the whole of which was marked Defendant's Exhibit X-7 for identification and ask you if you recognize the book?

A. I have seen it before.

Q. Now I show you the portion thereof which has been marked Exhibit X-7-B in evidence, being the pages from January 1 to February 13, and February 15 to February 21, and Defendant's Exhibit X-7-A in evidence, which is the page for February 14, and ask you if we went over these pages last night?

A. Yes, we did.

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Q. Have you examined the entries in this book from February 5 to February 20, inclusive?

A. Yes, I have.

Q. Does that refresh your recollection as to whether between February 5 and February 20, 1953 you worked on and prepared these work papers, Defendant's Exhibits V-7-A to V-7-G, inclusive?

A. Not my recollection but this record shows I didn't work on them.

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Q. When did you work on V-7-A to V-7-G, if you recall?

A. If I recall? I don't recall.

Q. All right.

A. Going by the records it would be some time between February 1st and March 15th.

Q. You weren't there on February 1st.

A. I am sorry, I meant February 21st.

Q. All right. Now as to that time, February 21st to March 15, 1953, would you tell the jury what experience you had had as an accountant?

[fol. 389] A. That is a general question, what experience. I just worked from the beginning of my employment with Sanfilippo doing general accounting work up to February 21st, whatever came along. There were certain taxes involved, bookkeeping, accounting, general ledger, anything.

Q. Beginning with the time that you went with the Sanfilippo firm?

A. Beginning with.

Q. Is that correct?

A. Yes.

Q. Had you been employed to do any tax work by anyone prior to that time?

A. No.

Q. Had you been employed to do bookkeeping prior to that time?

A. I did work for about three weeks for an accountant doing bookkeeping that was in the summer of '50.

Q. In the summer of 1950?

A. Yes.

Q. Had you had any other actual accounting experience?

A. No.

Q. Do you recall being given any instructions as to what you should do? Do you recall any?

A. Not specifically, no.

Q. Do you recall whether you were told that the Doctor's returns for prior years were under investigation?

A. Not that it was mentioned, no.

Q. Do you have any recollection of who directed you as to what work you should do?

A. As a general outline—I have no specific recollection, no, but I—well, I have no specific recollection as to who told me.

Q. I am only asking you for your recollection at this time. Did you have any direct contact with Dr. Palermo in person or over the telephone in connection with your work?

A. No.

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Q. Mr. DeGeorge, I ask you to take Exhibit V-7-A, the 14-column worksheet entitled "Cash Ans." Is that right?

A. Yes.

Q. Is the worksheet V-7-A in your handwriting?

A. Yes, it is.

[fol. 390] Q. Is all of it in your handwriting?

A. Yes, it is.

Q. Do you recall from what source you got the information on this worksheet?

A. Again I don't remember, aside from that I reconstructed that I did prepare this from the prior years' work papers and I agreed with that.

Q. Do you see up at the top, the very lefthand side the word "Cash" and then it looks to me as though the next thing is "Ans."

A. That's right.

Q. You wrote that?

A. I did.

Q. What does "Ans" mean?

A. Again from what I saw—

Q. First, of your own recollection.

A. I don't know. It should have meant "Analysis." What "Ans" is here I don't know.

Q. Now I show you Defendant's Exhibit U-7-A in evidence which is an analysis of the cash account for 1951 prepared by Mr. Amoruso, and I call your attention to the heading at the top reading "Cash" and then another word. Do you see that?

A. Yes.

Q. Does that refresh your recollection as to where you got that "Cash Ans"?

A. That's where I copied it from.

Q. Look at U-7-C which is in evidence. Do you observe that it contains a list of stocks held at 1/1/51? Do you see that?

A. I do.

Q. And do you observe that from the worksheet it appears that certain of the stocks listed on U-7-C were not sold during 1951?

A. Yes.

Q. Do you recall whether, Mr. DeGeorge, in setting up the stock inventory in 1953, which is V-7-A, you looked in your firm's files to see what other stocks the defendant had?

A. Well, I would have referred to the 1951 work papers.

[fol. 391] Q. Mr. DeGeorge, Exhibit V-7-B are the stock transactions, Fox, O'Hara, Margin Account, and V-7-C is the work sheet for the stock transactions, Newburger, Loeb Margin Account.

Do you see that?

A. Yes, I do.

Q. Would you look at V-7-B, please, Fox, O'Hara. Is most of this page in your handwriting?

A. Yes.

Q. Now here again, what was this worksheet set up to cover?

A. It should have been the inventory of stocks held in the Fox, O'Hara margin account; the acquisitions for the year 1952; the sales and the profit and loss, short and long.

Q. Now here again you start out with 1/1/52. Do you see that?

A. Yes, I do.

Q. Now I observe that some of the entries in that column or under that column start in 1950?

A. That is correct.

Q. U-7-C relates to a margin account. Do you see that?

A. Yes, it does.

Q. And what we are working on now, V-7-B, also relates to a margin account?

A. It does.

Q. In working on V-7-B then, am I correct that you took what appeared on U-7-C?

A. Yes.

Q. Well, we have asked you, Mr. DeGeorge, where you got the information which is on V-7-A and I believe you testified from a prior worksheet, and I now show you Exhibit U-7-A and ask you if that refreshes your recollection as to whether you used the 1951 worksheets in setting up your worksheets for 1952?

A. It doesn't refresh my recollection.

[fol. 392] Q. I show you U-7-B—this seems to have been my error—U-7-B is the second page of the worksheet of which U-7-A is the first. Now would you look at U-7-B and check that, please.

A. These two papers seem to account for the figures that I used in my opening inventory.

Q. Mr. DeGeorge, I would like you to have before you Exhibits V-7-D, E, F and G, which are four worksheets in evidence relating to dividends, and I ask you whether they are four worksheets which were prepared by you?

A. The majority of the work was prepared by me.

Q. On each of those pages?

A. Yes.

Q. I show you Government's Exhibits 286 to 293, inclusive, which are in evidence as Dr. Palermo's margin account with Newburger, Loeb in 1952, and Exhibit 297 which is in evidence as a special subscription account of the Doctor's with Newburger, Loeb in 1952.

Would you look at the Newburger, Loeb margin account, if you please, which is before you. On the first page do you find an item "Transferred" or "Trfd to Cash Account"? Do you see such an item?

A. Yes, I do.

Q. And under the heading "Price" do you see "JRL"?

A. Yes, I do.

Q. And the sum of "1442.13." Do you see that?

A. Yes, I do.

Q. When you were working on the Doctor's brokerage account in 1953 do you recall seeing that item?

A. No, I don't recall.

Q. Do you recall whether anyone told you to watch for such an item?

A. No, I don't recall that either.

Q. Did you at that time do any work that you can recall to follow through such an item?

A. No, none that I know of.

[fol. 393] Q. Did you at that time know what such an entry in a brokerage account meant?

A. I doubt very much that I did.

Q. Will you look on the page of that account for March? Before you do that, look at the page for April, would you, please?

A. Yes.

Q. And there do you find an item reading as follows: "Div. 200 Intl. Tel & Tel." Do you see that?

A. Yes, I do.

Q. That indicates a dividend, does it not?

A. Yes, it does.

Q. Now would you go back and look at the first page of the margin account and do you see on the first page, about a third of the way down, an item, "Check Motorola, Inc."?

A. Yes, I do.

Q. Do you recall considering whether that item was a dividend?

A. I don't recall.

Q. And on the next page do you find an item under February 4th, about a third of the way down, "Check Eversharp, Inc. \$70"?

A. Yes, it is on the first page.

Q. Then would you look, please, at the page for April. Do you see "Check Electric Auto-Lite Co. \$487.50"?

A. Yes, I do.

Q. And "Check J. I. Case Co. \$780"?

A. Yes.

Q. And "Check Emerson Elec Mfg Co. \$210"?

A. I see that.

Q. Did anyone give you any instructions that you recall as to what you should do about such items?

A. No, I don't recall.

Q. Do you recall whether you asked anybody about them?

A. No, I don't.

Q. Do you recall whether you recognized them at the time as dividends?

A. I don't know whether I did or not.

Q. I show you Exhibit 6, which is the Steiner, Rouse card and ask you whether you recall making any ex-[fol. 394]amination or analysis of the brokerage accounts which you had with Exhibit 6 to ascertain whether Ex-

hibit 6 listed all of the dividends revealed by the brokerage accounts?

A. I don't remember doing anything like that, no.

Q. Do you recall doing any work on these brokerage accounts other than to list the items set forth on the specific accounts?

A. I don't understand the question, I am sorry.

Q. Well, let me rephrase it: So far as you recall, did you do anything to ascertain whether you had, in fact, before you all of the records with respect to all of the accounts the existence of which was indicated on the papers that you did have?

A. No, I did not.

Q. One final question: I won't go over them item by item. If it should appear that dividends were omitted which appear on the brokerage accounts, or that there were other omissions, did anyone tell you to leave anything out?

A. No.

ORDWAY HILTON, called as a witness on behalf of the defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Newcomb:

Q. Now, Mr. Hilton, what is your occupation?

A. I am an examiner of questioned documents, which includes the identification of handwriting, typewriting, pencil and ink, and the detection of alterations and erasures in documents.

Q. Where is your office or laboratory located?

A. At 15 Park Row, New York City.

Q. And how long have you been engaged in your present work?

[fol. 395] Mr. Miller: If the Court please, the Government will concede the witness' qualifications.

Mr. Newcomb: Will the Government concede that Mr. Hilton is a recognized expert as an examiner and analyst of questioned documents?

Mr. Miller: Yes, your Honor, the Government will so concede.

Mr. Newcomb: All right.

Q. Mr. Hilton, I show you Defendant's Exhibit YY in evidence and ask you if you have made an examination of the first page of it at my request.

Mr. McHugh: Mr. Newcomb, is that 1950?

Mr. Newcomb: That is the 1950 return, first page.

A. I did.

Q. And did you make an examination of the portion which is enclosed in the circle in the upper lefthand side?

A. Yes.

Q. I am referring to the portion in the upper left where there is a circle in pencil and roughly where the box, the printed box, is. Do you see that?

A. Yes.

Q. Did you examine that at my request to ascertain whether there was any matter there that had been erased?

A. I did.

Q. And to make out, if possible, what was there before it was erased?

A. Yes.

Q. Now, did you make an infrared photograph of this section, of this exhibit?

A. Yes, that was one of the photographs I made.

[fol. 396] Q. Based upon your examination, which you have described, do you have an opinion, first, as to whether there was something there before it was erased?

A. I do.

Q. And do you have an opinion, second, as to what it was before it was erased?

A. Yes.

Q. And would you tell us what your opinion is.

A. Well, it is my opinion that there had been pencil writing in that area, in the area of the printed box or the

pencilled semicircle, and that what had been written there originally in pencil read "Signed copies in working papers."

Q. May I have the infrared photographs which you have prepared?

A. Yes, that is a copy of it.

Q. I show you Defendant's Exhibit H-10 for identification and ask you if this is the infrared photograph you have described?

A. It is.

Q. And is it an accurate and correct photograph of the top portion of Exhibit YY?

A. It is. It is accurate and correct. I should say further that it is slightly enlarged—enlarged one and a half times the original size of the area reproduced from Exhibit YY.

Q. All right. Now looking at the top of Exhibit YY, do you observe that over the printed portion of the exhibit in evidence reading "U. S. Individual Income Tax Return", a red line or several red lines are drawn through the printed matter I have just read?

A. Yes.

Q. Looking at the very top of Exhibit YY, above the red lines I have described, have you examined the exhibit to ascertain whether something was there which has been erased or has become undecipherable?

A. Yes, I have. I used the same examination as I did for the other portion.

Q. And based on that examination, do you have an opinion as to what was written at the top?

[fol. 397] A. Yes. There was an erasure or the pencil writing has become obliterated, but I believe it was erased, and it reads—read originally, "From 1950 on file Custom House."

Q. Now I show you what has been marked Exhibit I-10 and ask you whether Exhibit I-10 is also an infrared photograph of this same portion but with material on it which was added by you?

A. That is correct. It is a duplicate print from the same photographic plate as the portion, H-10.

Q. And to Exhibit I-10 what did you add which was not on Exhibit H-10, and describe the nature of what you added rather than the details.

A. Well, on Exhibit I-10 I placed over with red ink the fragments of letters that had been erased on the original form as I interpreted them after my various examinations. That would be true in the area, in the printed block, in the form 1040, and also I did the same thing with the erased words and letters and numbers that appear over the printed "U. S. Individual Income Tax Return," and in one other instance on the main line where there was an erasure of the word, of the abbreviation for doctor, "Dr."

Q. Now, other than the instances in which you have traced or made tracings on Exhibit I-10, is Exhibit I-10 a duplicate of Exhibit H-10?

A. It is.

Q. Do these tracings that you have placed on Exhibit I-10 reflect your opinion as to what was on Exhibit YY and erased?

A. That is correct.

Mr. Newcomb: Your Honor, at this time I offer in evidence Exhibits H-10 and I-10.

Mr. Miller: No objection, your Honor.

(Defendant's Exhibits H-10 and I-10 for identification received in evidence.)

[fol. 398] Q. Mr. Hilton, I show you Defendant's Exhibit I-4 in evidence, which is the schedule C of the 1951 retained copy.

Mr. Hilton, have you at my request made an examination of that portion of Exhibit I-4 which is enclosed in a circle towards the middle or towards the upper lefthand side, the upper third of the page?

A. I have.

Q. Did you prepare an infrared photograph?

A. I did, but in this case I prepared an enlarged photograph using an ordinary photographic film emulsion that seemed to me to show more clearly what had been in that area.

Q. All right. Let me see the photograph that you have prepared.

A. (Witness hands photograph to Mr. Newcomb.)

Mr. Newcomb: May I have this also marked in two portions as Defendant's Exhibits J-10 and K-10.

(Marked Defendant's Exhibits J-10 and K-10 for identification.)

Q. Based upon your examination which you have described, do you have an opinion as to whether underneath the material now appearing on the exhibit there was originally something else? Do you have an opinion?

A. I do.

Q. And what is your opinion as to whether there was something else there?

A. There very definitely was other writing there before the present writing that can be easily read, and was placed on the document.

Q. Do you have an opinion as to what was there? First, do you have an opinion?

A. I do.

[fol. 399] Q. Now, will you tell the jury what in your opinion was there before there was this erasure and overwriting.

A. In my opinion what had been originally written under the word "figures" on the first line of this material in the circle were the two words "all figures." And under the second line, or slightly below it, there was written, in my opinion, two words. Unfortunately, I cannot interpret all of them, but I can clearly interpret the first two letters of the first word or the capital E and small s. There is some other writing, and the word continues along and ends with a small d, and then following the small d appears the fragment of the word "by." And then on the last line, again, I see the overwriting in the erasing process—I am

unable to interpret the entire word that was there. There are several strokes at the beginning and then the letters "oruso," that finish the word out, but I could not make an accurate interpretation of what the first letters might be.

Q. Did you prepare another photograph which is Exhibit K-10?

A. I did.

Q. Will you tell the jury what Exhibit K-10 is.

A. Exhibit K-10 is a duplicate photographic print of Exhibit J-10, but in this instance I have added to it, using red ink again, by tracing over the fragments of letters and words that appear, that were erased, in my opinion. In other words, I have traced over this to show my interpretation, as I have just explained, in my opinion, of what was originally written there.

Q. Did you add to Exhibit K-10 the tracing that now appears there in red ink?

A. I did.

Q. Did you add anything else to K-10 which was not on J-10?

A. No, sir.

(Defendant's Exhibits J-10 and K-10 for identification received in evidence.)

[fol. 400] Q. All right. Mr. Hilton, I have one more series of questions. I show you Exhibit L-4 in evidence which is a pink slip memorandum list identified here as a list of expenses, business expenses, for 1951 in the handwriting of Mr. Amoruso. Do you see that?

A. Yes.

Q. Will you keep it before you. At my request did you examine it?

A. I did.

Q. Did you make an examination to ascertain whether or on the theory that any figures had been overwritten and changed?

A. I did.

Q. What type of examination did you make?

A. I made a visual examination and also examined the figures with a hand magnifier.

Q. And did you form an opinion?

A. I did.

Q. Will you look at the item which now appears as 364.35.

A. Yes.

Mr. Newcomb: Your Honor, I thought that we did not have copies of that but we do. May we pass them to the jury?

The Court: Yes.

Q. Do you see the item of 364.35?

A. I do.

Q. Would you look at the portion which says, "35".

A. Yes.

Q. And tell me whether there was originally under it some other numbers?

A. In my opinion there was, under the "3".

Q. And what in your opinion was the number under the "3"?

A. The number "2" had been written there originally.

Q. Would you look at the item, 458.70.

A. Yes.

Q. Do you have an opinion as to whether anything was under the "5" of "458"?

A. Yes. In my opinion that read "478" at one time, in other words, "7" for a "5".

[fol. 401] Q. Would you look at "397.40", being the next item, and the number "4".

A. Yes.

Q. And I ask you whether you have an opinion as to whether anything was under that "4" different from "4".

A. Yes, sir. In my opinion there could have been a "2" under that "4" of the "40" cents.

Q. And do you see the next item, "178.54"?

A. Yes.

Q. Do you have an opinion as to whether there were something under the "8"?

A. Yes, in my opinion there seems to have been a "9" under that "8".

Q. The next one is "214.85."

A. Yes.

Q. Do you see that one?

A. Yes.

Q. Do you have an opinion as to whether anything was under either the "8" or the "5" or both?

A. Well, those numbers have been overwritten and it would be difficult for me to interpret them, but there was written there originally—there is a stroke coming under the upper loop of the "8" that appears to belong to the original writing rather than the present "8". It looks as though the "5" had been overwritten, but it might have been a "5" underneath.

Q. So you can't tell what was under there with any certainty?

A. No.

Q. Mr. Hilton, I would like to direct your attention again to Exhibit YY and the two items on that first page in respect to which I have not asked you to prepare a photograph.

A. Yes. May I have YY again?

Q. Have you examined it to ascertain whether in the figure in line 5 on Exhibit YY now reads "5507.48"?

A. Yes.

Q. And at my request did you examine that to ascertain whether there was anything under it at some prior time that was different, and, if so, what?

A. I did. I examined it, and in my opinion there had been another figure written in that area. It is a little difficult to interpret just exactly what had been written there, [fol. 402] but considering that line and also line 7, which is a different figure, calculated from line 5, and the fact that there had been a change on line 7 as well, it would appear that line 5 originally read "6417.48," and the line 7 originally read "5117.48."

Mr. Newcomb: May I read into the record at this time the brief excerpts from the testimony of Mr. Sanfilippo given on July 16, 1956 under oath when being examined by Special Agent McGowan?

Mr. McHugh: It was feally Harper.

Mr. Newcomb: By Special Agent Harper, the portion being that discussed with the Court and shown to Mr. McHugh.

Suppose I just read it into the record.

The Court: Yes.

Mr. Newcomb: The testimony, Lady and Gentlemen of the Jury, is as follows:

"Q. What fees did you receive from Dr. Palermo during the years 1948 to 1952, inclusive, for all the work you did?

"A. I cannot remember the exact amount. I believe it was in the neighborhood of about three or four hundred dollars for his personal work.

"Q. Is that exclusive of the real estate records?

"A. Inclusive of that.

"Q. A total of three or four hundred dollars a year?

"A. Right. Then a larger amount for Palmo Realty, possibly three or four hundred dollars, and possibly the same amount for 408 Estates Corporation."

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SEYMOUR LASKOW, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Q. Mr. Laskow, will you try to remember to keep your voice up so that the members of the jury on this end as well as counsel can hear?

A. Yes.

[fol. 403] Q. What is your occupation?

A. I am a certified public accountant.

Q. Are you associated in any way with an accounting firm at the present time?

A. Yes, sir, I am.

Q. And what is the name of the firm?

A. McMahon, Andrews & Company.

Q. Are you a partner in that firm?

A. I am.

Q. Do you also have your own office in addition to your association in that firm?

A. I do.

Q. How long have you been a certified public accountant?

A. Since November 1943.

Q. And prior to that time were you employed as an accountant?

A. I was.

Q. Were you retained to do accounting work in connection with the Doctor's affairs?

A. I was.

Q. When were you retained?

A. In September 1955.

Q. And by whom were you retained?

A. The legal firm of Dwight, Royall, Harris, Koegel & Caskey.

Q. Without going into the details, what were you retained to do?

A. Well, we were retained to examine the mass of data that had been turned over to the law firm so as to make such analyses and to do such accounting work as would be necessary to arrive at the amounts of dividends and capital gains which had been earned during the years in question, and, if necessary, to prepare amended returns.

Q. I show you Government's Exhibit 1-A, being the amended return for 1950, and ask you if you observe thereon your signature?

A. I do.

Q. And was that amended return certified by you personally?

A. It was.

Q. And was it prepared by your staff and yourself under your supervision?

A. Yes, sir.

Q. I show you Government's Exhibit 2-A, which is the amended return for 1951, and ask you if you observe your signature on it?

A. Yes, sir.

[fol. 404] Q. Did you certify that return?

A. I did.

Q. Was it prepared by your staff and yourself?

A. Yes, sir.

Q. And under your supervision?

A. Yes, sir.

Q. I show you the defendant's amended return for 1952, Government's Exhibit 38, and I ask you if you observe thereon your signature?

A. Yes, sir.

Q. And was that return certified by you personally?

A. It was.

Q. And was it prepared by yourself and your staff and under your supervision?

A. It was.

Q. I show you Government's Exhibit 4-A, which is the amended return of the defendant for 1948, and ask you if you signed that one?

A. Yes, sir.

Q. Did you certify it personally?

A. I did.

Q. And was it prepared by you and your staff working under your supervision?

A. Yes, sir.

Q. I show you Government's Exhibit 5-A in evidence, being the amended return for 1949 of the defendant, and ask you if you signed and certified that one?

A. Yes, sir.

Q. And was it prepared by you and your staff and under your supervision?

A. Yes, sir.

Q. I believe you testified that among the things that you were retained by the law firm in September 1955 was to do the work necessary to determine whether amended returns should be filed, and, if so, to prepare them?

A. Yes, sir.

• • • • •

Q. After you were retained, what did you do?

A. I examined the data and determined upon the course of action which would best permit me to arrive at the final determination of what the actual dividends and the capital gains, if any, had been during the years in question.

Q. Well, when you say you examined the data, what data are you referring to?

A. Brokerage statements from various companies for various periods, bank statements and cancelled checks for [fol. 405] various years, retained copies of Federal income tax returns, worksheets of the accounting firm of Arthur R. Sanfilippo & Company, and worksheets of the previous attorney, whose name escapes me at the moment.

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Q. You examined, you say, some worksheets?

A. Worksheets, correct.

Q. Do you have any idea how many worksheets there were?

A. I have no recollection of the exact number.

Q. Can you give us an estimate, a rough idea?

A. Based only on recollection, I should imagine that I examined between 30 and 50 worksheets.

Q. Mr. Laskow, did you use in your work the worksheets that you inherited, so to speak?

A. I did not.

Q. Was there prepared under your supervision and filed a 1954 tax return for Dr. Palermo?

A. Yes, there was.

Q. Can you tell us approximately when that was filed?

A. That was filed in the middle of October, 1955.

Q. Was there prepared under your supervision and filed an amended return for 1954 on behalf of the Doctor?

A. Yes, there was.

Q. When approximately was that filed?

A. In the middle of January, 1956, to the best of my recollection.

Q. Was there prepared under your supervision and filed a tax return for the Doctor for 1955?

A. Yes, there was.

Q. When approximately was that filed?

A. Approximately in the middle of October, 1956.

[fol. 406] Q. Mr. Laskow, did you at any time in connection with your work go to the bank?

A. I went to the National City Bank.

Q. What did you do there?

A. I took a physical count of the securities which were in the Doctor's name and which were pledged as collateral on a loan to the Doctor from the bank.

Q. Did you take a physical count of all the collateral that was pledged?

A. That's correct.

Q. When did you do that, approximately?

A. October, 1955.

Q. Mr. Laskow, will you please take the amended return, Government's Exhibit 4-A, which is for the year 1948, and which you have testified was prepared under your supervision.

Mr. Newcomb: I ask that there be marked for identification a folder of work papers which I ask be marked Defendant's Exhibit N-10.

(Defendant's Exhibit N-10 marked for identification.)

Q. I show you Government's Exhibit N-10 for identification and ask you to look at it and tell the Court and jury whether it comprises your work papers or the work papers prepared by you or those working under your supervision with respect to the amended return for 1948?

A. Well, I have a master sheet of brokerage accounts which I used and I would like to see that to check this and to see if it is complete.

Mr. Newcomb: May we mark for identification as Exhibit O-10 a 14-column spread sheet entitled Schedule of Brokerage Accounts.

(Marked Defendant's Exhibit O-10 for identification.)

[fol. 407] Q. I show you Exhibit O-10 for identification and ask you to tell us what it is.

A. It is a listing by year of those brokerage accounts in the names of Dr. A. M. Palermo and Rosina Palermo used by me and my staff in the preparation of the amended returns.

Q. In preparing the amended 1948 return would you tell us the sources of the information contained therein and used by you in detail?

• • • • •

Q. Mr. Laskow, would you tell the Court and jury the sources upon which you based your 1948 return, not what was in the sources but what sources you used?

A. I used the Fox, O'Hara margin and cash accounts in the name of Dr. Palermo. I used the Fox, O'Hara & Company margin account for 1948 in the name of Rosina

Palermo. I used the original return, the retained copy of the return from the Sanfilippo office, and I used a published annual dividend record for the year 1948.

Q. When you said that you used the margin and cash accounts of Fox, O'Hara of the defendant, for what years did you use those accounts?

A. Well, in the preparation of the 1948 return we used, in addition to the 1948 accounts themselves, the account in the Fox, O'Hara, the margin account, and in the Fox, O'Hara cash account, for the years 1944 through 1947, inclusive, in addition to those 1948 accounts.

Q. You used them from 1944 to 1947, inclusive?

A. That is correct.

Q. Did you use for any year an account with Steiner-Rouse & Company?

A. Yes. For the year 1946 we used an account with Steiner-Rouse & Company in the Doctor's name, and we also used in addition to the Steiner-Rouse account, we used the Bache & Company account in the name of Dr. Palermo for the year 1946.

Q. Did you use a cash account of Rosina Palermo for 1946?

A. Yes, we did.

[fol. 408] Q. And the margin account of Rosina Palermo with Fox, O'Hara for 1947 and 1948?

A. And 1945.

Q. And 1945?

A. That is correct.

Q. Did you obtain or use any original dividend checks issued by corporations?

A. No, sir.

Q. Did you use any cancelled stock certificates?

A. No, sir.

Q. Did you use any stock certificate numbers?

A. No, sir.

Q. Did you obtain or use any corporate transfer or dividend records?

Q. Well, let me see if I can refresh your recollection. Do you recall—

Q. Do you recall one other item involving RCA?

A. I recall that there was a telephone call placed by one of the members of my staff to, I believe it was, the transfer agent of RCA, a woman, who helped us out with some information. As to whether it covered directly the 1948 return, I do not recall at this time. We did use that information at some time, but I am not prepared to say exactly which year it was.

Q. Would you look at the amended return for 1948, and would you look at the schedule portion thereof?

A. Yes, sir.

Q. It is in evidence here that there was interest of the defendant at the Corn Exchange Bank amounting to \$1647 in 1948. Did you include that amount in the amended return?

A. No, sir.

Q. It is in evidence here that the defendant had interest in the National City Bank in 1948 in the amount of \$723.75. Did you include that amount in the return?

A. No, sir.

[fol. 409] The Court: I don't understand your question. You said that he had interest. Did you understand counsel to mean that he earned that much interest or paid that much interest?

The Witness: Paid—that was interest paid.

The Court: And you did take the deduction?

The Witness: I did not take the deduction.

Q. It is in evidence here that the defendant had pledged for the loan at the Corn Exchange Bank a number of securities listed in his name. Did you include in the 1948 amended return all transactions involving stock pledged by the defendant with the Corn Exchange Bank?

A. We did.

Q. Did you do anything in connection with the 1948 return with respect to stocks pledged by the defendant as collateral for his loan?

A. Yes, we included—yes, we did.

Q. And what did you do?

A. We included all dividends earned on such securities in preparing the amended return.

Q. Would you look at the return, please, and tell us whether there were any capital gain or loss transactions reflected therein for 1948?

A. There are none.

Q. Would you look at the 1949 amended return. Do you have that before you?

A. Yes, sir.

Q. What is the exhibit number?

A. 5-A.

Q. What sources were used by yourself and your staff in preparing that return?

A. We used the Fox, O'Hara & Company margin accounts in the names of both Dr. A. M. Palermo and Rosina Palermo; Fox, O'Hara & Company cash accounts in the names of both Dr. A. M. Palermo and Rosina Palermo. We used the cancelled checks of the National City Bank for the year 1949. We used the retained copy of the Doctor's 1949 income tax return. We used the annual [fol. 410] published dividend record for the year 1949, and we made use of such other information from the earlier years' brokerage accounts that we had previously obtained. To the best of my recollection, those were the sources that we used.

Q. Tell the jury how you used the bank accounts and the cancelled checks.

A. We used the cancelled checks of the National City Bank to look for checks to brokerage accounts. We then checked or compared the checks that we found made payable to, in this case, Fox, O'Hara & Company, to compare them with the items, the comparable items appearing on the brokerage account, with particular reference to the cash account—to the margin account; and then used the checks, the remaining checks, to compare them with the comparable items appearing on the cash account.

Q. Would you look at the portion of the 1949 return relating to interest—the amended return relating to interest.

A. Yes.

Q. It is in evidence here that the defendant paid to the Corn Exchange Bank for the year 1949 interest amounting to \$1569.15. Did you include that item as a deduction in the amended return for 1949?

A. No, we did not.

Q. It is in evidence here that the defendant paid to the National City Bank for 1949 interest amounting to \$1452.73. Did you include that item in the return?

A. No, we did not.

Q. Will you look, please, at the 1950 amended return and tell us the exhibit number?

A. That is Exhibit 1-A.

Q. Will you tell us what sources you used to obtain the information set forth in that amended return?

A. We used the retained copy of the Doctor's 1950 return. We used an account in the name of Rosina Palermo in Ira Haupt & Company. We used an account in the brokerage firm of E. F. Hutton & Company in the Doctor's name, and we used the Fox, O'Hara margin and cash accounts for both Dr. Palermo and Rosina Palermo for that year.

[fol. 411] In addition to that, we used the cancelled checks and the annual published dividend record. In addition to that, it is possible, although I don't recall exactly at this moment, that the Doctor may have had the Corn Exchange Bank account in that year, and, if so, we used it.

Q. Do you recall anything else that you used that year?

A. We also made use of the information that we had gathered from previous years' brokerage accounts.

Q. Is there anything else that you can recall?

A. Not offhand, I don't recall anything else.

Q. Do you recall whether for this year, which was 1950, you had any real estate management statements?

A. Oh, yes, we had periodic reports by a manager of Dr. Palermo's real estate, accounting to the Doctor for the income and expenses of the properties.

Q. Describe to the jury, please, the manner in which you used the cancelled checks and the real estate information.

A. As to the real estate information, we prepared a summary of the information contained therein, and we com-

passed that information or that summary—our summary—with the retained copy of the 1950 tax return. We found it to be substantially correct and made no changes in the figures as shown on the retained copy. You asked for another—

Q. For the cancelled checks.

A. We used the checks primarily as a—well, we used the checks for several things. First, we used the checks to the brokerage accounts and compared those checks with the entries, comparable entries, appearing on the brokerage account, and, in particular, in the year 1950, it is by reason of the cancelled checks, at least one cancelled check to E. F. Hutton & Company, that we learned of the account and got in touch with the company and got the brokerage account.

Q. Would you look at the amended return for 1950 and the interest deductions or deductions taken thereon. Do you have that before you?

A. Yes, sir.

[fol. 412] Q. It is in evidence here that the interest paid by the defendant to the National City Bank in 1950 was in the amount of \$1256.96. Did you include that in your return?

A. Yes, we did.

Q. It is in evidence here that the defendant paid to the Corn Exchange Bank as interest for 1950 the total sum of \$1410.41. Did you include that in the defendant's return?

A. No, sir, we did not include it.

Q. Please take the return for 1951 and tell the Court and jury, please, the sources from which you obtained the information reflected in that return:

A. For the year 1951 we used the brokerage account of Fox, O'Hara, the margin accounts of Fox, O'Hara & Company for Dr. Palermo and Rosina Palermo. We used the Fox, O'Hara cash account in the name of Dr. Palermo, a Fahnstock & Company account in the name of Dr. Palermo. We used the retained copy of the return. We used the annual published dividend record. We used the checks of the National City Bank, and I believe also the Corn Exchange Bank. We used the periodic management reports relating to the real estate.

To the best of my recollection, that is the total of what we used. And also, I should add again, the information from earlier years which we had built up from 1944 on from the brokerage accounts and other sources.

Q. Would you look at the interest section of the 1951 amended return?

A. Yes, sir.

Q. It is in evidence here that the defendant paid to the Corn Exchange Bank for the year 1951 as interest the total sum of \$1357.35. Did you include that in your amended return?

A. We did not.

Q. It is in evidence that the defendant paid interest to the National City Bank for 1951 in the amount of \$6169.86. Did you include that in your return?

A. Yes, we did.

Q. Would you look at the 1952 amended return?

A. Yes.

[fol. 413] Q. Tell us what the exhibit number is.

A. 3-A.

Q. By the way, I did not ask you as to the 1949, 1950 and 1951 amended returns whether you used—let me withdraw that and put it this way. In connection with the 1949, 1950 and 1951 returns what did you do with respect to stocks pledged by the Doctor at the National City Bank?

A. We included all the income on such stocks in the Doctor's name pledged as collateral at the National City Bank.

Q. What did you do with respect to the stock pledged at the Corn Exchange Bank?

A. We likewise included the income on such stocks in the Doctor's amended income tax return for the year in question.

Q. And did you do the same thing with respect to the amended return for 1952?

A. Yes, sir.

Q. Now on the 1952 return would you tell the Court and jury what sources you used in preparing that return?

A. We used the Fox, O'Hara & Company margin accounts in the name of Dr. A. M. Palermo and Rosina Palermo. We used the Fox, O'Hara cash accounts in the name of Dr. Palermo, the E. F. Hutton & Company account in the name

of Dr. A. M. Palermo, Fahnestock & Company account in the name of Dr. A. M. Palermo, and the Newburger, Loeb & Company margin and cash accounts in the name of Dr. A. M. Palermo, and Newburger, Loeb & Company cash account in the name of Rosina Palermo, Newburger, Loeb & Company special subscription account in the name of Dr. Palermo, Merrill Lynch, Pierce, Fenner & Beane account in the name of Dr. Palermo, Hirzfeld & Stern margin account in the name of Dr. Palermo, Ira Haupt & Company cash account in the name of Rosina Palermo.

We also used the bank accounts for the year 1952. We used the retained copy of the 1952 return. We used the annual published dividend record for the year, and we used the information built up over the previous years from 1944 on from the brokerage accounts and bank statements which I previously described.

[fol. 414] Q. I am sorry, I may have missed it, but did you use the published dividend record?

A. Yes. We also for the year 1952 used the periodic statements issued by the manager of the real estate.

Q. Did you mention the bank accounts?

A. Yes, I believe I did.

Q. All right.

A. We did use them.

Q. With respect to the brokerage statements of Fahnestock, Hutton, Merrill Lynch, and Hirzfeld, Stern, do you recall whether there were any transactions in any of those accounts that were reflected in the 1952 return, actually included in it?

A. To the extent that the Doctor earned dividends on securities purchased in those accounts, of course we reflected them. As to whether he sold any of those securities purchased and we recorded them, we certainly recorded all sales. I could not recall at this time as to whether specifically he sold securities purchased in the accounts we have mentioned.

Q. Would you look at the interest deduction portion of the amended return?

A. Yes, sir.

Q. It is in evidence here that the Doctor paid \$10,521.89 interest to the National City Bank that year. Did you include that in your return?

A. We did.

Q. It is in evidence that the Doctor paid \$395.01 to the Corn Exchange Bank that year as interest; did you include that?

A. We did.

Q. It is also in evidence that the Doctor paid to the Corn Exchange Bank that year by way of interest the additional sum of \$327.99; did you include that additional sum?

A. We did not include that, no.

Q. Would you describe to the jury, please, the accountant method used by you in handling the stock transactions as reflected in the returns?

A. Yes. Beginning with the earliest transactions we were able to find, we set up a stock inventory control which consisted merely of entering in this control all of the Doctor's purchases as to date, from whom purchased, whether in the margin account or in the cash account, the amount paid for such purchase and all of the sales paid which information included the date of the sale, the name of the brokerage firm to whom it was sold, the type of account to which it was sold, whether margin or cash account, and the amount received in dollars for said sale.

By the use of this inventory control system, we were able to establish at any given time the number of shares owned by the Doctor of any given stock and the amounts paid individually for such securities and paid in total for such securities. We were able as a result of having such information as to the amounts of securities owned by the Doctor to establish through the use of the annual published dividend record how much his dividends were in any year, and we were also able to establish through the use of this stock inventory control as to the Doctor's sales, what it cost, what cost should be allocated to such sale.

Q. Mr. Laskow, have you prepared or caused to be prepared under your supervision comparisons of the dividend and capital gains figures arrived at by your firm and incorporated in the amended returns, using the method and sources you have described, with the figures submitted by the Government in its charts or analyses?

A. I have.

Q. Mr. Laskow, I show you Exhibit P-10 for identification and ask you to tell us what it is, not what is in it.

A. This is a schedule, worksheet for Dr. A. M. Palermo for the year 1950, setting forth the capital gains and losses as per our amended returns or his amended returns prepared by us and the same capital gains and losses which we took from the Government chart for the year 1950.

[fol. 416] (Defendant's Exhibit P-10 for identification received in evidence.)

Q. I show you Exhibit Q-10 for identification and ask you to tell us what it is.

A. This is a worksheet which sets forth for A. M. Palermo his capital gains and losses for the year 1951 per his amended return and compares those capital gains and losses with the figures per the Government's exhibit.

(Defendant's Exhibit Q-10 for identification received in evidence.)

Q. Mr. Laskow, look at Exhibit P-10 again and without going into details at all would you mind telling us the total—that is, describe briefly the differences between the figures set up in the amended return and those set up on the Government's chart, and do this very briefly, please.

A. Dr. Palermo's return of 1950 recorded sales in the amount of \$74,707.54. The Government's chart shows exactly the same amount, \$74,707.54. Dr. Palermo's amended return for 1950 allocated costs to the sales of \$74,707.54, which amounted to \$68,569.80. The Government chart indicates that for the same sales the costs allocated were \$68,558.30.

Q. I asked you the difference, I think. Tell us approximately what the difference amounted to.

A. \$11.50.

Q. I have shown you Exhibit Q-10, which is offered in evidence, and would you just give us those same figures from Exhibit Q-10, the figure on the amended returns as to

stock acquisitions and the cost of the stock compared to what is shown on the Government chart.

A. The amended return shows sales in the amount of \$64,733.81. The Government chart shows the same amount [fol. 417] of sales, \$64,733.81. The amended return shows costs allocated to such sales, \$65,625.81. The Government shows costs as \$64,608.12. The difference which is in the cost column is just under a thousand dollars.

Q. I show you Exhibit R-10 for identification and ask you to tell the jury what that is.

A. This is a worksheet which sets forth for Dr. A. M. Palermo for the year 1952 the details of his stock sales, as to the sales price and the cost allocated thereto. It arrives at the gains or losses for the amended return and compares all of these figures with the Government charts for sales, cost and gains or losses.

Q. Could you tell us what the final figures or the total figures are and the differences?

A. The amended return shows total sales of securities for the year 1952 under the name of A. M. Palermo in the amount of \$71,968.60. The Government chart shows exactly the same amount, \$71,968.60. The costs which we allocated to the sales on the amended return total \$56,375.46. The Government chart indicates that costs totaled \$53,570.82, which was allocated to the same sales, a difference in the cost column only of approximately \$2800.

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(Defendant's Exhibit R-10 for identification received in evidence.)

Q. I show you Exhibit S-10 for identification and ask you to tell us what that is.

A. This is a worksheet which sets forth the dividend income for the year 1950 of A. M. Palermo, comparing the figures shown on the amended return for the year and the Government chart for the same period, broken down as to dividends received in margin accounts, dividends received on personally-held securities and total dividends received from both types of sources.

[fol. 418] Q. Would you give us the figures, the total

figures, contrasting those in the amended return with those of the Government's chart?

A. The total dividend income for A. M. Palermo in 1950 as shown by the amended return was \$30,263.07. The figures for dividend income for the year 1950 in the name of A. M. Palermo as shown by the Government's chart was \$29,994.72, a difference of \$268.35.

Mr. Newcomb: I offer Exhibit S-10 in evidence.

(Defendant's Exhibit S-10 for identification received in evidence.)

Q. I show you Defendant's Exhibit T-10 and ask you to tell the Court and jury what this is.

A. This is a worksheet which sets forth for Dr. A. M. Palermo the dividend income for 1951 on securities which he owned, and compares as to margin account stocks, personally-held stocks and totals the amounts shown in the amended return and the Government chart for the year 1951.

Q. Would you give us the totals and the difference?

A. The amended return shows total dividends in the amount of \$29,269.43. The Government chart shows total dividend income for that year in the amount of \$29,238.01. The difference is \$31.42.

Mr. Newcomb: I offer it in evidence.

(Defendant's Exhibit T-10 for identification received in evidence.)

Q. I show you Exhibit U-10 and ask you to tell us what that is.

A. This is a worksheet for Dr. A. M. Palermo setting forth a comparison of dividend income for the year 1952 received in margin accounts, received from personally-held securities, and the total thereon, and the figures shown [fol. 419] in the amended return as compared with those in the Government chart. The total dividend income per the amended return is \$38,981.60. The total dividend income for the Government chart is \$39,252.36, a difference of \$270.76.

Mr. Newcomb: I offer Exhibit U-10 in evidence.

Mr. McHugh: Same position, of course.

(Defendant's Exhibit U-10 for identification received in evidence.)

Q. I show you Exhibit V-10 for identification and ask you to tell us what it is.

A. This is a worksheet for Dr. A. M. Palermo which sets forth a summary of his stock sales, stock costs, and economic gains or losses, and compares those figures as shown by the amended returns with the Government charts for the years 1950, 1951 and 1952. The comparison shows the following results, as to sales—

Q. For all years?

A. A total for the three years. As to sales, the amended returns show total sales for the three years 1950, 1951 and 1952 of \$211,409.95. The Government charts for the same three-year period total exactly the same amount, \$211,409.95. There is no difference between the amended returns and the Government charts. As to the costs allocated to the securities sold, the amended returns show total costs allocated, \$190,571.07. The Government charts show total costs allocated, \$186,809.24. The difference is \$3761.83.

Q. For the three years?

A. For the three years. As to economic gain or loss, the amended returns show a total of \$20,838.88. The Government charts show a total economic gain for the three-year period of \$24,600.71, a difference of \$3761.83, which is, as I pointed out before, the difference solely in the cost columns.

[fol. 420] Mr. Newcomb: I offer that in evidence.

Mr. McHugh: Same position.

(Defendant's Exhibit V-10 for identification received in evidence.)

Q. Mr. Laskow, in stating that these worksheets are for Dr. A. M. Palermo, were you including or excluding Rosina Palermo transactions?

A. For the purpose of these worksheets, we excluded Rosina Palermo.

Q. These are the figures relating to transactions in the name of Dr. Palermo?

A. That's correct.

Q. Would you tell us what Exhibit W-10 is?

A. Exhibit W-10 is a worksheet for Dr. A. M. Palermo which sets forth a summary of dividend differences between the amended returns and the Government schedules for the years 1950, 1951 and 1952. It sets forth the actual differences in each year and the total differences, total dividends per each exhibit or per the amended return and the Government chart, with the resulting net difference.

Q. Will you tell us the totals and the difference?

A. For the year 1950, the amended returns show a higher dividend of \$268.35; for the year 1951 the amended return shows a higher dividend than the Government chart in the amount of \$31.32; and for the year 1952, the Government chart showed higher dividends than the amended return in the amount of \$270.76. The net difference for the three-year period, \$29.01.

As to the total dividends received, the total dividends shown on the three amended returns for the years 1950, 1951 and 1952 total \$98,514.10. The Government charts show that Dr. Palermo received dividends totaling for the three-year period \$98,485.09, and on these ninety-eight and a half thousand dollars roughly for the three-year [fol. 421] period there is a difference between the amended returns and the Government charts of \$29.01.

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(Defendant's Exhibit W-10 for identification received in evidence.)

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(Discussion off the record.)

Cross examination.

By Mr. McHugh:

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Q. This morning, on examination by Mr. Newcomb, you listed a number of sources of information that you and your associates availed yourselves of in preparing these amended returns; do you recall that?

A. Yes, sir.

Q. Do I take it by your answers that you did not consult Dr. Palermo for figures in the preparation of these returns?

A. No, that is not correct.

Q. I am incorrect?

A. Yes, sir.

Q. Then you did get some of the figures in these returns, in the amended returns, from him; is that your testimony?

A. No, that is incorrect also.

Q. Well, perhaps I can clarify it and perhaps not.

In preparing the amended returns for the years 1950 through '52, did you obtain any of the figures you put in those returns from the defendant?

A. No, sir.

* * * * *

Mr. Newcomb: The defendant rests.

Mr. McHugh: Your Honor, the Government wishes to make an offer of proof.

The Court: All right, I will excuse the jury.

(Jury left the courtroom.)

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[fol. 422] SUMMATION ON BEHALF OF THE GOVERNMENT

Mr. McHugh:

* * * * *

What is the core of the Government's case? You will recall at the outset Mr. Miller told you that we were not charging this defendant with any income tax evasion or attempted evasion in the areas of medical practice income or his real estate income, and we are not. We do, however, charge and we say that the evidence has proven that there are three areas of fraudulent income that this defendant had, all arising out of his dealings in the stock market.

May I say that the only years that we are concerned with here are 1950, 1951, and 1952, the three years in the indictment. Those are the only years, if any, upon which you can convict this defendant of income tax evasion. There are two prior years which we put in evidence, 1948

and 1949, for the purpose of showing the consistent pattern of income tax evasion, but they are not in issue before you in so far as the direct criminal charges are concerned.

What are the three areas of fraud in the indictment years? First of all, the proof shows that this defendant concealed income, a substantial portion of the income that he received by way of dividends on stocks that he held personally, that is, they were sometimes called vault stocks, the stocks that he had in his own name, not in any brokerage account, and stocks on which the corporations or their dividend-disbursing agents who testified here or produced their records sent dividends directly to him, not through any broker.

Next the proof shows that this defendant did not report any of the dividends or capital gains income that he received in the three indictment years, 1950 through 1952, in the names of his three dummies, Rosina Palermo, Rose J. Palermo, his niece, and Catherine Schultz, his friend.

Finally, the third area of fraud in this case was the concealment by the defendant of a substantial portion of the capital gains that he earned and derived from the sale of stocks in his cash accounts at Fox, O'Hara and other brokers. That source of fraudulent income, in so far as the tax authorities were concerned it was fraudulent, was derived in two of the indictment years only, 1950 and 1952. In 1951, to which I will refer at a later time, he had a capital loss in his cash account and, oddly enough, that was the year in which all of his cash account transactions were reported.

Let us discuss them then year by year. First of all, in 1950. In so far as his personally-held stocks were concerned that year, you will recall that his accountant, his brother-in-law, testified that the defendant gave him the figure of \$4,000 as his dividend income on personally-held stock.

That was the figure that Carrie Artino testified she put on the worksheet, it is in the worksheet, which is in evidence.

Nowhere does there appear anywhere else in the evidence anything to show that the accounting firm received any other figure other than \$4,000 from this defendant for the income on his personally-held stocks in 1950, the dividend income.

How does that compare with the truth? In 1950, remember this defendant had over \$17,000 worth of dividends on the stocks that he held personally in his own name. Do you think that there was mere confusion on his part or mere mistake on his part when he gave his brother-in-law only a quarter of that figure, some \$13,000 less than the truth? We say not.

[fol. 424] Next let us look at the second area of fraud in 1950. The income that this defendant had in the names of his dummy accounts and stocks. On Rosina Palermo stocks and accounts in 1950, this defendant took in over \$2,200 worth of dividends and an additional \$4,300 plus in capital gains, taxable capital gains. Then he took in \$750 more in dividends on the stocks held in the names of Catherine Schultz and Rose Palermo Giordano. When you realize that this defendant raked in some \$7,300 in 1950 through his dummy accounts and stocks, ask yourselves if there is any proof whatsoever in this record that he told Mr. Sanfilippo or gave anyone in that accounting firm any information at all about that. There is none.

In fact, in that year Mr. Sanfilippo testified once on direct examination and twice on cross-examination that he had absolutely no knowledge before the commencement of the tax investigation by Agent Mishler of the defendant's income that he enjoyed in the name of Rosina Palermo, and I shall come back to that later.

Finally, in 1950, what did the cash account sales amount to? In 1950 this defendant had profits of over \$5000 net taxable profits, \$5000 or more, on the sale of stocks through his cash accounts.

You will recall that Mr. Sanfilippo testified that cash accounts came to him only occasionally and sporadically, and then to substantiate the cost basis of some sales that

he already been told about or knew about. There is no effort or no proof here to show that, in fact, he was given cash accounts in 1950, 1951 and 1952, or that he was given cash accounts in complete form.

Now, what were the actual fraud areas in 1951? First of all, as to his stock held personally in his own name, the defendant actually received, the proof shows, over \$19,200 of income, but he reported only a lump sum figure of \$3800 [fol. 425] to Mr. Amoruso. That was the figure the accountants put in their work papers; that was the figure that was included in the amounts that were put in the return. That was the only figure they had.

But the defense tries to knock this down, tries to put the onus on the accountants, and says, "Oh, they should have played detective; they should have ferreted out this fraud."

Can't you just picture Mr. Sanfilippo doing that with his brother-in-law's tax returns?

Now, in 1952 we find that all of the three areas of fraud are again involved.

First of all, on personally-held stock, remember that this is the year that the defendant gave the Sanfilippo firm the Steiner, Rouse form, Exhibit 6, listing dividends both for 1951, the year which was then under investigation, and 1952, which was the year on which they were going to prepare his tax return.

There is no doubt at all that this Steiner, Rouse form came from the defendant and was given to Sanfilippo. Sanfilippo testified to that. Mr. Amoruso testified to that. The big controversy seems to be, when. Well, let's see what the proof is on that. I am not going to dwell on it to the extent that Mr. Newcomb did this morning when he used about 40 minutes of his summation on it, but it shows how important that form is in this case and the weight that the defense attaches to it, because they know it came from the defendant to Sanfilippo, and that is established beyond peradventure of doubt.

This is not just a telephone conversation. This is not just a round figure given to one of the partners. This is

a document that you yourselves can see and look at. You are entitled to do so during your deliberations if you want. [fol. 426] I say, with all due respect to Mrs. LaCombe, and you heard virtually all of her testimony on that subject read this morning, that she was mistaken when she said she worked on it in 1952.

You will remember too, of course, that in 1951 the defendant had reported only \$3800 of dividends on his personally-held stocks, and this Steiner, Rouse form shows about sixteen or seventeen thousand dollars in dividends received in that year.

And don't forget, when you think of that, this form came from the possession of the defendant to Sanfilippo.

When Mr. Miller made his opening address to you on behalf of the Government in this case he asked you to scrutinize with care the testimony of the witnesses the Government would call on its own case, and he pointed out to you, very justly at that time, that the Government cannot pick and choose the witnesses to a crime or the facts establishing the commission of it.

Who were some of the people we had to call? Let us look at the roster: Arthur Sanfilippo, the brother-in-law of the defendant and his accountant for about thirty years;

Anthony Amoruso, Sanfilippo's partner, a man who had known him since he was a child;

Now, I think that you can evaluate the testimony of those people, put it in its proper context, on the basis of our old friend common sense that I spoke about. You don't need me to tell you to do that. You do it every day of your lives in the conduct of your serious affairs. Here in court they call it the demeanor of the witness. It just [fol. 427] means that you look at people; you weigh their testimony for what it is worth.

We ask you to do that with respect to these witnesses and all of the witnesses in the case.

You will recall that Mr. Sanfilippo was on the stand for quite some time, over six days. He was a man in a very ugly situation. He was a member of this close-knit family. He has been associated with the defendant as his accountant and as his brother-in-law for over thirty years.

Did Sanfilippo impress you on direct examination by me as a man who was pouring out a tale eager to hurt his brother-in-law, eager to put all the blame on him? No, I think not.

And on cross-examination Mr. Newcomb went after him with all of his ability, which is considerable. Under cross-examination how many people could bear up under that without lashing out sometime or other if there were any hostility or any desire to do harm; but there was none. He sat there and he took it. He was going out of his way not to hurt his brother-in-law.

It was almost ludicrous to sit here at times and hear this man being accused, inferentially at least, by some of Mr. Newcomb's questions, being accused of negligence or lying or worse, and he would sit there and say, "I have no such information" or some answer to that effect. Do you think he was eager to hurt his brother-in-law?

Mr. Newcomb also implied in his cross-examination of Mr. Sanfilippo that he might be testifying in a certain way so that he would not lose his Treasury card. And yet isn't it strange that both he and Mr. Amoruso gave testimony on direct examination by the Government to the effect that their firm had taken signed blank income tax returns from this defendant, a practice for which they might well lose such Treasury cards?

[fol. 428] And look further back: What was Mr. Sanfilippo's attitude when this case was being investigated? I told you before that he did not tear up the documents that were going to be used against him. In 1954, after the defendant had retained the firm of Higgins, Brenner & Higgins to represent him, Mr. Sanfilippo turned over all of the books and papers and documents when he was asked for his brother-in-law's financial affairs and gave them to that firm.

What did Mr. Sanfilippo do when he was subpoenaed to testify before the Revenue Agents? He went to see Mr. John Wells of the firm of Dwight, Royall, Harris, Koegel & Caskey, and that was in to the firm that he recommended as Mr. Newcomb has suggested by his questioning. Mr. Sanfilippo said that he may have recommended the Higgins firm but Dwight, Royall was a different firm. Do you think for one moment that Mr. Sanfilippo, if he were out to hurt his brother-in-law, the defendant, he would have gone running off to see Mr. John Wells and to have a conference with him before he testified before the revenue agents? I say that that defies common sense and it defies logic.

And Mr. Newcomb suggested that he sought counsel from Mr. Wells as to how he should testify. But, of course, Mr. Wells didn't testify and Mr. Sanfilippo has denied that.

And thereafter, after he was questioned by the revenue agents, Mr. Sanfilippo gave a copy of his questions and answers statement, which was furnished to him, to the defendant's lawyers; and Mr. Amoruso did the very same thing, before this trial, long before it. Do you think for one moment that if they lied about anything or thought they said anything untrue in those statements that they were going to turn them over to the defendant's lawyers so that they could be used to cut their own throats? I say that defies common sense too.

[fol. 429] Remember too, according to the testimony of Mr. Frisch, that as late as October 11, 1955, Mr. Amoruso went off to see the law firm of Dwight, Royall, Harris, Koegel & Caskey and participated in a conference there—after he had been questioned by the revenue agents. Do you think he would have done that if he were out to hurt the defendant or thought that he had lied about him?

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Of course, if a Government agent or an independent CPA went prowling through the records, looking for some evidence of fraud, knowing in advance that it was there or that he would be looking for it, then he might find it. But Sanfilippo was not a Government agent; he was the defendant's brother-in-law. He was not acting as an

accounting firm retained to look for fraud and to make up amended returns or do anything of that like. He was just accepting the figures that the defendant gave him. He was his brother-in-law—don't forget that fact.

Do you think for one moment that Arthur R. Sanfilippo sat down with this defendant and said, "Doc, you are lying to me. You are not giving me all the income. Come clean. Come on now, tell me about the Rosina income. Tell me about the rest of it." Of course he didn't. But he wasn't a Government agent and we are not bound by what Arthur R. Sanfilippo did.

If Arthur R. Sanfilippo chose to close his eyes to the fraud that this defendant was committing, that is his business, at least for the moment, but it does not in any way excuse the wilful tax evasion on the part of this defendant, and his Honor will charge you as to the law on that.

Mr. Newcomb, when he introduced some of these work papers in evidence, pointed to the word "audit" on them, trying to suggest that Sanfilippo was conducting an audit of the defendant's returns. All these work papers are in evidence and you can look at them at any time you wish. [fol. 430] And, members of the jury, you will find that the only auditing that was done in there was with respect to the defendant's real estate holdings and transactions, and over half of the work papers, in fact, about two-thirds in each and every year refer to real estate transactions which are no part of this case.

It may very well be that Mr. Sanfilippo was either a stupid pawn or a very willing accomplice of the defendant, or willing to wink at income tax evasion. Whatever they knew, we know they were not Government agents or employees. If they were willing to look the other way or ignore income tax evasion, that does not absolve this defendant for his part in the income tax evasion.

* * * * *

[fol. 431]

IN UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

v.

ANTHONY M. PALERMO, Defendant.

NOTICE OF APPEAL—Filed February 3, 1958

Name and address of appellant: Anthony M. Palermo, 302 West 86th Street, New York, N. Y.

Name and address of appellant's attorneys: Wyllys S. Newcomb, Esq., 165 Broadway, New York, N. Y. and Royall, Koegel, Harris & Caskey, 100 Broadway, New York 5, N. Y.

Offense:

Count 1—Violation of Section 145(b), Internal Revenue Code of 1939, 26 U. S. C. Section 145(b) for the year 1950.

Count 2—Violation of Section 145(b), Internal Revenue Code of 1939, 26 U. S. C. Section 145(b) for the year 1951.

Count 3—Violation of Section 145(b), Internal Revenue Code of 1939, 26 U. S. C. Section 145(b) for the year 1952.

[fol. 432] Concise statement of judgment or order, giving date, and any sentence: Feb. 3, 1958; sentence imposed; two (2) years imprisonment, plus costs of proceedings in the amount of \$2,729.20.

Name of institution where now confined, if not on bail: Paroled in custody of attorney pending posting of bail.

Anthony M. Palermo, above named appellant, hereby appeals to the United States Court of Appeals for the Second Circuit from the above-stated judgment.

Dated: New York, New York, February 3, 1958.

Wyllys S. Newcomb, Attorney for Appellant.

Royall, Koegel, Harris & Caskey, By /s/ John A. Wells.

[fol. 433]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 388—October Term, 1957.

(Argued June 3, 1958)

Docket No. 25085

UNITED STATES OF AMERICA, Plaintiff-Respondent,

—v.—

ANTHONY M. PALERMO, Defendant-Appellant.

OPINION—August 18, 1958

Before: Hincks, Pickett and Moore, Circuit Judges.

Appeal from the United States District Court for the Southern District of New York, Edward J. Dimock, Judge.

Earl J. McHugh, Assistant United States Attorney, New York City (Paul W. Williams, United States Attorney, and Charles H. Miller, Assistant United States Attorney, New York City, on the brief), for Plaintiff-Respondent.

Wyllys S. Newcomb, New York City (Royall, Koegel, Harris & Caskey, and John A. Wells, Robert E. Frisch, Andrew L. Clark and Burton N. Bromson, New York City, on the brief), for Defendant-Appellant. *

[fol. 434]

PICKETT, Circuit Judge:

The defendant, Anthony M. Palermo, a New York doctor, was convicted on each of three counts of an indictment charging him with wilfully attempting to evade and defeat his personal income taxes for the years 1950, 1951 and 1952, in violation of Section 145(b), Internal Revenue Code of 1939. During the course of the trial, a demand was made by the defendant for the production of a written memorandum prepared by Internal Revenue Agents sometime after a conference between them and a witness who subsequently testified for the Government at the trial.¹ The trial court denied the request on the ground that the memorandum was not of the character which was required to be produced under the provisions of Title 18, U. S. C. A., Section 3500.² The right of the defendant to inspect and use the memorandum is the single question presented by this appeal.

During the investigation of the defendant's income for the years in question, the Internal Revenue Agents took the sworn testimony of the accountant whose firm had prepared his tax returns. After the testimony was transcribed, the accountant again appeared before the agents to read and sign the transcript of his testimony. Some corrections were noted and an affidavit to effect the changes was made and executed. Shortly after the meeting was concluded, a memorandum of what had taken place at the meeting was

¹ The memorandum was marked "Court's Exhibit 2" and is part of the record in this Court.

² This section was enacted shortly after the decision of the United States Supreme Court in *Jencks v. United States*, 353 U. S. 657. Its purpose was to fix standards by which statements and reports of a witness in the possession of the Government should be made available to a defendant in a criminal prosecution after the witness had testified.

prepared by the agents and placed in the Government files. It referred to the correction affidavit and stated that the witness gave further oral information in answer to questions [fol. 435]. The additional information contained in the memorandum also concerned the preparation of defendant's tax returns and related to subject matters about which the accountant later testified. A copy of the sworn testimony and the supplemental affidavit, together with the witness' testimony before the grand jury, were delivered to defendant's attorneys.

We do not agree with defendant's contention that under the provisions of Section 3500 the memorandum should have been made available to him. The term "statement," as used in the Section, refers to "(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." It is quite apparent from the record that this memorandum was made from memory by one of the agents and was not intended to be a "substantially verbatim recital" of anything said by the witness. It was merely a summary of the agent's recollection of what had transpired at the meeting. The witness had not signed, adopted or approved it. It does not appear that the memorandum was a transcript of notes taken during the interview or that it purported to be a recorded verbatim recital, or nearly so, of what the witness had said. The declared purpose of the statute was "to provide for the production only of written statements previously made by a Government witness in the possession of the United States which are signed by him or otherwise adopted or approved by him, and any transcriptions or recordings of oral statements made by the witness to a Federal law officer, relating to the matter as to which the witness has testified." U. S. Code Cong. and Adm. News, 85th Congress, First Session, 1957, page [fol. 436] 1862. This would include, we think, memoranda prepared by Government agents of oral statements made to such agents by Government witnesses, which are shown

to be a substantially verbatim recital of oral statements contemporarily recorded by the agent.³ The evident purpose of the statute is to limit the right of inspection for use in cross-examination to reasonably accurate or authenticated statements and reports, for which the witness, not the Government agent, is responsible. The document in question does not come within this category.

The defendant further contends that, even though production of the memorandum is not required by the provisions of Section 3500, he is, under the rule of *Jencks v. United States*, 353 U. S. 657, entitled to have it produced for his use. In the *Jencks* case, Government witnesses who were in the employ of the United States made numerous written and oral reports to the F. B. I. concerning their activities with the Communist Party. The court held that the Government must produce for inspection all written reports of the witnesses and also the oral reports as recorded by the F. B. I., touching the events and activities to which [fol. 437] they testified at the trial. There the Court was dealing with written and oral reports made to superiors, by former Communists who had been employed by the United States to do undercover work. It developed after the trial that much of the testimony given by one witness was re-

³ When the Bill was discussed on the floor of the United States Senate, the following colloquy occurred:

"Mr. Revercomb: Does the definition of 'records' which have been made or which must be produced, include memoranda made by an agent of the Government or any other statement which may have been obtained and signed?"

"Mr. O'Mahoney: I think it would include a memorandum made by an agent of the Government of an oral statement made to him by a Government witness, but not by a third party. . . ."

"Mr. Javits: As a practical matter, then, what has been done with the so-called records provision is to tie it down to those cases in which the agent actually purports to make a substantially verbatim recital of an oral statement that the witness has made to him—not the agent's own comments or a recording of his own ideas, but a substantially verbatim recital of an oral statement which the witness has made to him, and as transcribed by him; is that correct?"

"Mr. O'Mahoney: Precisely." 103 Cong. Rec. 16488 (1957).

canted as deliberately false. The broad language used by the Court⁴ was interpreted differently by lower courts and by attorneys.⁵ The enactment of Section 3500 followed in the wake of this decision. Although the Committee reports indicate that the legislation was "not designed to nullify, or to curb, or to limit the decision of the Supreme Court insofar as due process was concerned," or to permit the prosecution to withhold competent and relevant statements and reports which might be of value to a defendant in the cross examination of a witness, its purpose was to provide a procedure and establish the rules and conditions under which trial courts shall direct the production of statements or reports of witnesses in the possession of the United States. Without considering whether there is a conflict between the *Jencks* decision and the requirements of Section 3500, we hold that the legislation is the exclusive standard in this field and controls the procedure to be followed in [fol. 438] such cases.⁶ Otherwise, the legislation is meaning-

⁴ In speaking of the particular reports under consideration in the *Jencks* case, the Court said:

"... We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F. B. I., touching the events and activities as to which they testified at the trial. We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less." (Footnote omitted)
353 U. S. 657, 668-9.

⁵ For examples see U. S. Code Cong. and Adm. News, 85th Congress, First Session, 1957, pages 1862-9.

⁶ The Committee reports on the legislation indicate that Congress looked with favor upon Chief Judge Moore's analysis of the *Jencks* decision in *United States v. Anderson* (E. D. Mo., 1957), 154 F. Supp. 374, 375-6, which reads as follows:

"(1) Before the Defendant in a criminal cause is entitled to production and inspection of a statement made by a person other than himself in the possession of the United States—

less. *Bergman v. United States*, 6 Cir., 253 F. 2d 933;
Lohman v. United States, 6 Cir., 251 F. 2d 951.

Affirmed.

[fol. 439]

IN UNITED STATES COURT OF APPEALS
 FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,

v.

ANTHONY M. PALERMO, Defendant-Appellant.

JUDGMENT—August 18, 1958

Appeal from the United States District Court for the
 Southern District of New York.

(a) such person must have been called as a witness by the United States, (b) the Defendant must establish on cross examination that a statement was made by such witness, (c) that such statement is in the possession of the United States, and (d) that such statement touches the events and activities related in his direct examination.

“(2) Such statement must either have been (a) written by the witness himself, or, (b) recorded by someone acting for the United States.

“Category (b) includes only continuous, narrative statements made by the witness recorded verbatim, or nearly so, by persons acting for the United States, and does not include notes made during the course of an investigation (or reports compiled therefrom) which contain the subjective impressions, opinions or conclusions of the person or persons making such notes.

“(3) When any document contains material which a defendant, having made the preliminary showing set out in (1), is entitled to see, and also contains matters which he is not privileged to see, the United States need furnish only that portion or portions, which he is entitled to see and may retain the balance.”

See U. S. Code Cong. and Adm. News, 85th Congress, First Session, 1957, pages 1865-6.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

A. Daniel Fusaro, Clerk, By John M. Doyle, Deputy Clerk.

[fol. 440] [File endorsement omitted]

[fol. 441] [File endorsement omitted]

[fol. 443]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 388

UNITED STATES OF AMERICA, Plaintiff-Respondent,
against

ANTHONY M. PALERMO, Defendant-Appellant.

PETITION FOR REHEARING—Filed August 29, 1958

To the Honorable Judges of the United States Court of Appeals for the Second Circuit:

Petitioner, Anthony M. Palermo, presents this petition for a rehearing in the above-entitled cause seeking clarification and reconsideration of the opinion and decision of this Court filed on August 18, 1958.

This Court, in affirming the decision below:

(a) Held that the agent's memorandum of August 23, 1956 (Court's Exhibit 2) is not "a substantially verbatim recital" within the meaning of Section 3500 of Title 18, U. S. C.;

(b) Suggested, without specific ruling, that the agent's memorandum was not "recorded contemporaneously" within the meaning of Section 3500;

(c) Held that the agent's memorandum was not within Section 3500;

(d) Held that Section 3500 is exclusive as to substance and not merely as to procedure;

[fol. 444] (e) Declined to consider whether there is a conflict between the decision of the Supreme Court in *Jencks v. United States*, 353 U. S. 657 (1957) and the requirements of Section 3500, as the latter are construed by this Court; and

(f) Stated no facts and set forth no analysis in its opinion from which this petitioner, or the Supreme Court of the United States upon an application to review, or other litigants or their counsel in this Circuit can determine what meaning or interpretation this Court places upon the statutory phrases "substantially verbatim recital" and "recorded contemporaneously".

In addition, in its opinion this Court failed to observe the fundamental and vital distinction between the agent's memorandum (to which the defendant has never contended he was or is entitled) and the *statements of the witness Sanfilippo* as recorded in the memorandum.

By way of outline of the rationale of this petition for rehearing, we respectfully urge not merely that this Court's decision is erroneous, but also that, in fairness to the appellant, in order that the substantial questions here presented may be fully and justly presented for review by the Supreme Court of the United States, and to the end that the Bench and Bar in this Circuit may be guided in future trials, this Court should grant your petitioner a rehearing as to the aspects of the matter embraced in this petition.

We respectfully urge further that, for the same reasons and to the same ends, your petitioner should be granted by this Court, for use upon such rehearing, inspection of those portions of the agent's memorandum of August 23, 1956 (Court's Exhibit 2) as will reveal:

[fol. 445] (1) the time the memorandum was prepared, in relation to the time when the witness Sanfilippo made the statements to the agent; and

(2) the manner in which the memorandum records what the witness Sanfilippo said to the agent on or relating to those subject matters as to which the witness Sanfilippo testified upon trial.

I

What petitioner sought upon the trial and seeks now are the statements of the witness Sanfilippo.

The petitioner concedes (and has never contended otherwise) that he was not entitled to the agent's version "of what had taken place at the meeting" (Op., p. 2234), or "of what had transpired at the meeting" (Op., p. 2235), as distinguished from what the witness Sanfilippo said to the agent. The "statement" involved here is the "statement" of the witness, as recorded by the agent, not the statement of the agent.

The distinction, we submit, is vital. That Sanfilippo said something to the agent is obvious; indeed it has been conceded by the government not only that Sanfilippo said something to the agent on August 23, 1956 but also that what Sanfilippo said touched upon and related to the same subject matters as those embraced within his testimony upon the trial. The government has also conceded that the agent made a record of these statements in his memorandum (Res. Br., p. 20). The petitioner was entitled to those statements if they were "recorded". The manner or form of the recording is not decisive and it has been repeatedly held that it is not necessary that the recording be in the exact words of the witness. *United States v. Waldman*, 159 F. Supp. 747 (D. N. J. 1958); *United States v. Papworth*, 156 F. Supp. 842 (N. D. Tex. 1957); *United States v. Anderson*, 154 F. Supp. 374 (E. D. Mo. 1957).

[fol. 446] We are dealing with substance, not form. The form undoubtedly goes to the weight of persuasiveness to be accorded the statements upon the trial. It may also affect the use, if any, which trial counsel may determine to make of them upon the trial. It does not, so long as the substance is there, go to the petitioner's right of access

to the statements of the witness, in whatever form their recording may have been.

II

Petitioner should be granted sufficient inspection of Court's Exhibit 2 to enable him intelligently to argue his case.

Petitioner asks that he be granted sufficient inspection of Court's Exhibit 2 to enable him intelligently to argue his case.

This honorable Court has stated in its opinion that the agent's memorandum does not constitute a "substantially verbatim recital" (Op., p. 2225). The opinion is silent as to this Court's interpretation of the exceedingly vague and baffling phrase to which we refer, and as to the facts or absence of facts upon which this Court bases its conclusion that the requirement of a "substantially verbatim recital" is not met.

In its opinion this honorable Court has at least suggested that the statements of the witness Sanfilippo were not "recorded contemporaneously". Here also the opinion is silent as to the facts, or absence of them, upon which the Court's conclusion is based. Nor does the Court's opinion contain any criterion, description or standard by which or from which its precise ruling can be determined.

So far as we have been able to find, there is nothing in the legislative history of Section 3500 indicating precisely what the Congress has in mind.*

[fol. 447] We are dealing with a new statute. So far as we know, the instant case is the first reported decision of a negative character with respect to the problem here presented.

It is manifestly impossible for the petitioner or his counsel intelligently to present to this Court, or to the Supreme Court upon an application for review, persuasive, proper arguments as to the applicability to a document we have never been permitted to see of the phrases "substantially verbatim recital" and "recorded contemporaneously".

* But see the discussion of the applicability of the *Jencks* decision, *infra*, p. 6 (fol. 448).

This aspect of petitioner's application is undoubtedly a novel one. Yet, we submit, that it is eminently fair, reasonable and proper. The issue is substantial and important. It is in the public interest that it be resolved and resolved clearly, one way or the other. If access to the basic information is afforded your petitioner; it is not improbable that the rehearing will be fruitful, even if this Court's ultimate conclusion remains unchanged.

III

The memorandum in question was prepared contemporaneously within the generally accorded meaning of that word.

The memorandum in question was prepared by a special agent of the Internal Revenue Service on the basis of an investigative interview of the man who was the principal witness for the government on trial. It has been conceded by the government that the document was prepared "some hours after the conclusion of the conference" (Res. Br., p. 21). Although this Court's opinion is silent as to when the agent's memorandum was prepared, it does not indicate that the government's concession was in error.

If this Court's ruling is that Congress intended the phrase "recorded contemporaneously" to exclude any recording not made simultaneously, it is respectfully submitted that such ruling should be made clear. We submit that Congress never intended such an interpretation to be placed upon the statute and that, by choosing the word "contemporaneously", Congress intended the statute to have a meaning directly contrary to the result apparently reached by this Court.

IV

The statutory requirement of a "substantially verbatim recital" has been complied with.

The phrase "substantially verbatim recital" is, as we have said, a vague and baffling one. We have found nothing in the legislative history which sheds helpful light upon what Congress intended other than the statement from the Committee reports quoted in the Court's opinion at page

2227 to the effect that Congress did not intend that Section 3500 should limit the *Jencks* decision in any way. We submit that this statement requires interpretation of that phrase in the statute in such a way as to include any recording of the same nature as that which the Supreme Court determined the defense was entitled to in the *Jencks* case.

As pointed out in our main brief at page 36 and our reply brief at page 12, the reasoning and logic of the *Jencks* decision involves due process. "Justice", said the court, "requires no less" (353 U. S. at p. 669). Accordingly, if Congress had no intention of limiting the *Jencks* decision as far as due process is concerned, it must have intended to make available to the defense statements recorded in the same manner as those involved in the *Jencks* case. We have already pointed out to this Court at pages 11, 12, 14 and 15 of our reply brief the identical character of the statements sought here and in the *Jencks* case.

We believe and respectfully submit that the phrase was not intended to require the equivalent of a transcript of [fol. 449] everything that the witness said, nor that the recording purport to set forth the whole of the conversation between the witness and the agent.

If, regardless of the minutes or hours involved in the interrogation or conference and however lengthy the agent's memorandum, there is contained in that memorandum a single instance in which the agent sets forth the substance of something (otherwise relevant) said to him by the witness, then that portion of the agent's memorandum meets the requirement of a "substantially verbatim recital". Under the statute the application to inspect would, we submit, reach that portion and that portion only of the agent's memorandum. By reason of the occasion, the evidence in the record establishing the conference, the drafting and execution of an affidavit of Sanfilippo stating a new version as to government's Exhibit 6 (see our main brief, pp. 23-25), the statements and concessions made by the government upon oral argument before this Court and in its briefs in this Court, and the statements appearing in this Court's opinion, we are confident that Court's Exhibit 2 contains not one but several instances of this character.

We, therefore, respectfully urge that we be given an opportunity to inspect these limited portions of Court's Exhibit 2 and that a rehearing be granted in order that petitioner have the specific, basic material with which to analyze, explain and argue the issue of what constitutes a "substantially verbatim recital".

[fol. 450]

V

In the event that this Court determines that the petitioner was not entitled to inspect Court's Exhibit 2 under Section 3500, it should determine whether he was so entitled under the Jencks case.

The Court, on page 2227 of its opinion, declined to consider whether or not there is a conflict between Section 3500 and the *Jencks* decision. We respectfully submit that if Section 3500 is to be construed as this Court has construed it, such a conflict does exist. We further submit, as was pointed out at page 12 of our reply brief, that such a conflict must result in a finding that Section 3500 is in violation of due process and must be invalidated.

We respectfully urge that it is in the public interest that this Court should consider and decide this issue, one way or the other.

CONCLUSION

We respectfully submit that this Court should reconsider its opinion and decision of August 18, 1957 and reverse the judgment below. We further submit that oral argument would be helpful to this Court and respectfully request that re-argument be ordered and that the memorandum in question be made available to the petitioner so that this Court may have the benefit of argument by counsel based upon actual examination of the document.

Respectfully submitted,

Wyllys S. Newcomb, Royall, Koegel, Harris &
Caskey, Attorneys for Petitioner.

Of Counsel: Wyllys S. Newcomb, John A. Wells, Andrew
L. Clark.

[fol. 451]

CERTIFICATE OF COUNSEL

I hereby certify that this petition is presented in good faith and not for delay.

Wylls S. Newcomb, Of Counsel for Petitioner.

[fol. 453]

IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

[Title omitted]

ORDER DENYING PETITION FOR REHEARING—
September 25, 1958

A petition for a rehearing having been filed herein by counsel for the defendant-appellant

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk.

[fol. 454]

[File endorsement omitted]

[fol. 455] Clerk's Certificate to foregoing transcript
(omitted in printing).

[fol. 457]

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1958

No. 471

ANTHONY M. PALERMO, Petitioner,

—against—

UNITED STATES OF AMERICA, Respondent.

PETITIONER'S DESIGNATION OF PORTIONS OF RECORD TO BE
PRINTED—Filed December 29, 1958

Petitioner designates the following portions of the record
herein to be printed:

1. Petitioner's appendix printed for use of the Court of Appeals for the Second Circuit.
 2. Opinion of the Court of Appeals for the Second Circuit.
 3. Judgment of the Court of Appeals for the Second Circuit.
 4. Petitioner's petition for rehearing by the Court of Appeals for the Second Circuit.
 5. Order denying petitioner's petition for rehearing by the Court of Appeals for the Second Circuit.
 6. Petitioner's petition for writ of certiorari in this Court.
 7. Order of this Court granting petitioner's petition for writ of certiorari.
- [fol. 458] 8. This designation of portions of the record to be printed.

Petitioner further requests that Court's Exhibit 2, which was made part of the record in this Court upon the petition for writ of certiorari be a part of the record upon the hearing on the merits.

The following portions of the record herein designated to be printed were printed for the use of the Court below, and nine (9) printed copies of such portions have been furnished:

1. Petitioner's appendix printed for use of the Court of Appeals for the Second Circuit.

2. Petitioner's petition for rehearing by the Court of Appeals for the Second Circuit.

Dated: New York, New York

December 24, 1958.

/s/ JOHN A. WELLS, Wyllys S. Newcomb, Attorneys
for Petitioner.

[fol. 459] Affidavit of Service (omitted in printing).

[fol. 460]

SUPREME COURT OF THE UNITED STATES

No. 471, October Term, 1958

ANTHONY M. PALERMO, Petitioner,

vs.

UNITED STATES OF AMERICA.

ORDER ALLOWING CERTIORARI—December 8, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is transferred to the summary calendar and assigned for argument immediately following Nos. 435, 436, and 437.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of this application.

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FILED

OCT 24 1958

JAMES R. BROWNING, Clerk

IN THE
Supreme Court of the United States
October Term, 1958

No. 471

ANTHONY M. PALERMO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

WELLYS S. NEWCOMB,
55 Liberty Street,
New York, New York,

JOHN A. WELLS,
100 Broadway,
New York 5, New York,
Counsel for Petitioner.

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Supreme Court of the United States

October Term, 1958

No.

ANTHONY M. PALERMO,*Petitioner,*

v.

UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case on August 18, 1958.

Opinion Below

The opinion of the Court of Appeals for the Second Circuit (R. 433a) has not as yet been officially reported. A copy of that opinion is appended to this petition in the Appendix at pp. 13-18.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was made and entered on August 18, 1958 (R. 439a). Petitioner filed a timely petition for rehearing in the Court of Appeals on August 29, 1958 (R. 441a). The petition for rehearing was denied without opinion by the Court of Appeals on September 25, 1958 (R. 453a). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Does Section 3500, Title 18, U. S. C. grant to a defendant on trial in a criminal case in a District Court of the United States the right to inspect prior oral statements made to a government agent by the principal witness for the government, relating to the same material subject matters as are testified to by the witness upon the trial when the substance of said oral statements is set forth in a memorandum prepared by the government agent and in the possession of the government at the time of trial?

2. Is the requirement in Section 3500, Title 18, U. S. C., that there must be a "substantially verbatim recital" of the witness' statement, satisfied where a government agent's memorandum sets forth the substance of one or more prior statements made to him by the principal government witness as to the same material subject matters as to which the witness testified on the trial, although the agent's memorandum does not purport to quote the exact words used by the witness?

3. Is the requirement in Section 3500, Title 18, U. S. C., that the recording by a government agent of a prior oral statement by a trial witness for the government must be "recorded contemporaneously" satisfied where the government agent's memorandum in which the substance of the witness's oral statements was recorded, was prepared on the same day and within a few hours after the interview between the agent and the witness?

4. Does Section 3500, Title 18, U. S. C., provide the exclusive relief to which a defendant is entitled with respect to prior statements made to a government agent by the principal trial witness for the government, so as to prohibit inspection by the defendant of those portions of a government agent's memorandum which set forth the substance

of oral statements made by the witness to the government agent as to the same material subject matters as were testified to by the witness upon the trial?

5. If the answer to the fourth question set forth above is in the affirmative, does Section 3500, Title 18, U. S. C., involve an unconstitutional deprivation of the defendant's right to due process of law, guaranteed by the Fifth Amendment to the Constitution of the United States, when applied so as to prohibit inspection by a defendant of prior oral statements made to a government agent by the principal witness for the government, as recorded in a memorandum prepared by the agent, relating to the same material subject matters as were testified to by the witness on the trial?

6. Under the decision of this Court in *Jencks v. United States*, 353 U. S. 657, is a defendant in a criminal case entitled to inspect those portions of a memorandum made by a government agent in which the agent sets forth the substance of one or more pre-trial statements made to him by the principal trial witness for the government, relating to the same material subject matters as were testified to by the witness upon the trial?

7. Does the refusal by the trial court in a criminal case to permit inspection by the defendant of those portions of a memorandum, made by a government agent of a pre-trial interview with the principal trial witness for the government, which set forth the substance of what the witness said to the agent as to the same material subject matters as were testified to by the witness upon the trial, constitute a violation of the rule laid down by this Court in *Jencks v. United States*, 353 U. S. 657, governing the administration of justice in the federal courts?

8. Did the Court of Appeals err in denying petitioner's application that his counsel be permitted to have access to the pertinent portions of the document in order to be able

adequately to present the defendant's rebuttal to the assertions by the government that the recording of the witness's statements to the agent was not "recorded contemporaneously", and did not constitute a "substantially verbatim recital", within the meaning of Section 3500, Title 18, U. S. C.†

9. Does the proper administration of justice in the federal courts sanction a practice which places upon a defendant the burden of establishing that a document, which defendant's counsel has, despite timely and proper application, never been permitted to see, contains a "substantially verbatim recital", which was "recorded contemporaneously", of what a government trial witness said to a government agent, where the record affirmatively shows, (a) that the witness was interviewed by the government agent prior to the trial; (b) that in the course of the interview the witness made statements to the agent relating to the same, material subject matters as were testified to by the witness upon the trial; (c) that the government agent made a memorandum of the interview on the same day and within a few hours after it was concluded; and (e) that the memorandum set forth, among other things, the substance of what the witness said to the agent on the subject matters as to which the witness testified for the government on the trial?

Statute and Constitutional Provision Involved

Section 3500, Title 18, United States Code and Amendment V to the Constitution of the United States are set forth in the Appendix at pp. 22-24.

Statement

Petitioner was tried under an indictment charging him with willful attempt to evade and defeat his federal income taxes for the years 1950, 1951 and 1952, in violation

of Section 145(b) of the Internal Revenue Code of 1939 (R. 7a-9a).

On the trial, the principal, indispensable, witness for the government was the senior partner in the firm of certified public accountants which had prepared the petitioner's federal income tax returns for some twenty-five years, including the years covered by the indictment.

On direct examination this witness testified in substance that he and his firm faithfully recorded on petitioner's returns all of the information supplied by the petitioner, adding nothing and omitting nothing, thus placing upon the petitioner sole responsibility for all errors and omissions in the returns.

Of transcendent importance was Government Exhibit 6, a list of dividends, written in petitioner's own hand, relating to dividends in a particular category received during the tax year 1951. The dividends listed on this exhibit were so substantially in excess of the total dividends in that category reported in the 1951 return that, if the jury were satisfied that petitioner had withheld the document from the witness (petitioner's accountant) conviction was altogether likely.

In substance the defense was that the petitioner signed tax returns in blank each year, delivered them to the accountant and the latter's firm, furnished to the accountant and the accounting firm all bank statements, cancelled checks, brokerage statements and other pertinent records and documents, never saw the returns before or after they were filed and had neither knowledge nor notice that the returns were incorrect in any respect. There was a very substantial amount of evidence, consisting of oral testimony from many witnesses and significant documentary evidence, to support defendant's position.

As to the vital document, Government Exhibit 6, the defendant contended that it had been delivered to the ac-

countants well prior to the preparation of the 1951 return, and that failure to include these dividend items in the return was due to carelessness or mistake on the part of the accounting firm or, what was more likely, failure of communication between the partners in the accounting firm. There was very substantial evidence supporting the defendant's position as to this document. A completely disinterested witness, called by the government itself, so testified and there was a great deal of circumstantial evidence pointing in the same direction (R. 293a, 297a).

On direct and cross-examination the witness denied that the document had been delivered to him or his firm prior to the preparation of the 1951 return. Instead he asserted that it was first delivered to him at a much later date under circumstances which, if the witness was believed by the jury, were damning in the extreme (R. 31a, 153a-155a).

Thus the truth or falsity of the witness's testimony, both in general and in particular, with respect to Government Exhibit 6, was vital to both the prosecution and the defense. If the witness's testimony could not be discredited and overcome, conviction was a virtual certainty; if it could be overcome and other evidence indicating the delivery of Government Exhibit 6 to the accountants prior to the preparation of the 1951 return survived uncontradicted, a verdict of acquittal was equally probable.

On cross-examination of the witness, the defense brought out the fact that the witness had on several prior occasions been questioned by the Internal Revenue agents who had conducted the tax investigation which led to the indictment (R. 154a). Substantial, numerous and highly material discrepancies between his prior statements and his testimony at the trial were brought out on cross-examination and explored. That the witness' trial testimony was false in some respects is shown by the record to be patent and undeniable. Whether it was false in general insofar as

it placed responsibility upon petitioner, and in particular as to the time when petitioner delivered Exhibit 6 to the witness, constituted the jury's principal questions on which the defendant's fate depended.

It appeared that on August 23, 1956 there was a conference between the witness and special agent Harper, the agent conducting the tax investigation (R. 154a). The interview lasted two hours or more. There was discussed, among other things, Exhibit 6 and the time when it was first delivered by petitioner to the witness (R. 155a). There was also discussed a highly material and important change in the witness' position as to Exhibit 6. The witness had previously given sworn testimony under oath to the effect that he did not remember the Exhibit at all and was unable to say when it had been received by him. Nor had he been able to recall whether the Exhibit had been delivered to him by the petitioner prior to preparation of the 1951 return. At the conference with special agent Harper on August 23, 1956 the witness was shown a copy of the 1951 return and called upon to compare the figures in the return with the figures in the Exhibit. He then signed and swore to an affidavit to the effect that this comparison indicated to him that the Exhibit was not delivered to him until after the preparation of the 1951 return (R. 155a-156a).

Although the defense has never been afforded an opportunity to inspect any portion of the memorandum, and although the government has, even in the proceedings in the Court of Appeals, been extremely cautious in revealing the nature of the contents of the memorandum, it has conceded that the memorandum is a lengthy one; that it was made by Special Agent Harper on the same day and within "some hours after the conclusion of the conference"; that it sets forth the substance of what the witness said to special agent Harper about Exhibit 6 and the time when it was delivered to the witness; and that it sets forth the substance of what was said by the witness in

the interview as to other material subject matters as to which the witness testified for the government upon the trial.

In the course of the cross-examination of the witness while he was being questioned about the interview with special agent Harper on August 23, 1956, the defense made a timely and appropriate motion to inspect those limited portions of Harper's memorandum which set forth what the witness had said to Harper (R. 157a). After extensive argument the motion was denied (R. 157a-165a).

The Court of Appeals affirmed. The opinion of that Court stated that Section 3500, Title 18, U. S. C. had established the exclusive standard for production of prior statements of government witnesses and that the statements demanded were not within the statute. It stated that the memorandum was not a substantially verbatim recording of the witness's statements and, although it is not clear from the opinion, apparently the court held that it was not prepared contemporaneously. It declined to consider whether Section 3500, Title 18, U. S. C., as construed by the trial court and the Court of Appeals, is in conflict with the decision of this Court in *Jencks v. United States*, *supra*. Not expressly but by necessary implication the Court of Appeals declined to follow the decision of the Court of Appeals for the Sixth Circuit in *Bergman v. United States*, 253 F. 2d 933, decided March 12, 1958; rehearing denied with additional opinion April 23, 1958 (*Ibid*).*

The opinion of the Court of Appeals further indicates that in considering and evaluating the decision of this Court in *Jencks v. United States*, *supra*, the Court of Appeals was greatly influenced by the assumed fact that

* Copies of the opinions of the Court of Appeals for the Sixth Circuit in that case are appended to this petition in the Appendix at pages 19-22.

Matusow and Ford, the government witnesses in that case, had, by the time this Court rendered its decision, been thoroughly discredited.

In the petition for rehearing (R. 441a) petitioner asked that his counsel be afforded an opportunity to examine the pertinent portions of the agent's memorandum in order to be able intelligently to present the defendant's side of the case. The petition for rehearing further requested clarification of the opinion of the Court of Appeals on the point of what constituted a "substantially verbatim recital" as set forth in Section 3500, Title 18, U. S. C. It also sought clarification of the opinion of the Court of Appeals on the question of when a statement is "recorded contemporaneously" within the meaning of the same section. And finally on petition for rehearing the petitioner requested the Court of Appeals specifically to consider whether the decision of this Court in *Jencks v. United States, supra* requires that petitioner be afforded the inspection sought as a matter of simple justice and fair play, having an important bearing on the administration of justice in the federal courts. The petition for rehearing also raised the question of due process of law and the applicability of the Fifth Amendment of the Constitution of the United States, as had been done in the Court of Appeals and at the trial. Rehearing was denied without opinion on September 25, 1958 (R. 452a, 453a).

Reasons for Granting the Writ

The decision below should be reviewed because:

1. The Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court; namely that Section 3500, Title 18, U. S. C. enacted September 2, 1957 "is the exclusive standard" governing the right of a defendant in a criminal case to inspect prior statements made to government agents

by witnesses called by the government, relating to subject matters as to which the witnesses testify for the government on trial.

2. The Court of Appeals has decided a second important question of federal law which has not been, but should be, settled by this Court; namely, that Section 3500, Title 18, U. S. C. prohibits the inspection by a defendant in a criminal case of those portions of a memorandum made by a government agent which set forth the substance of what was said to the government agent by a witness testifying for the government upon the trial as to the same material subject matters as are covered by the witness in his trial testimony and has so narrowly construed the statutory phrase "substantially verbatim recital" as to exclude any recording other than an actual transcript or mechanical recording.

3. The Court of Appeals has decided a third important question of federal law which has not been, but should be, settled by this Court; namely, that, although a government agent made a memorandum on the same day and within a few hours after the government witness made an oral statement to the agent, the statement was not "recorded contemporaneously" within the meaning of Section 3500, Title 18, U. S. C.

4. The Court of Appeals has decided a federal question in a way conflicting with an applicable decision of this Court; namely, it has denied to a defendant in a criminal case the right to inspect a record made by a government agent of oral statements and reports made to the agent by a witness called by the government on the trial of a criminal case in contravention of the principles laid down by this Court in *Jencks v. United States*, 353 U. S. 657.

5. The Court of Appeals for the Second Circuit has rendered a decision relating to the same statute and the

same issues in conflict with the decision of the Court of Appeals for the Sixth Circuit in *Bergman v. United States*, 253 F. 2d 933.

6. The decision of the trial court, as affirmed by the Court of Appeals, has deprived the petitioner of the due process of law guaranteed to him by the Fifth Amendment to the Constitution of the United States; and

7. An authoritative construction and determination by this Court of the new federal statute, Section 3500, Title 18, U. S. C., is of special importance in order to guide the inferior federal courts in the application of the statute and to avoid unnecessary confusion and delay in trials in the federal courts.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted. It is respectfully submitted further that counsel for petitioner should be afforded an opportunity to examine the statements of the witness, as recorded by the government agent, in order that all the issues involved herein may be intelligently presented by the petitioner as well as by the government. The document in question was marked Court's Exhibit 2 upon the trial and was upon your petitioner's demand delivered to the Court of Appeals. Your petitioner has requested the Clerk of the Court of Appeals to transmit the document to this Court as part of the record.

WYLLIS S. NEWCOMB,
JOHN A. WELLS,

Counsel for Petitioner.

APPENDIX TO PETITION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 388—October Term, 1957

(Argued June 3, 1958

Decided August 18, 1958.)

Docket No. 25085

UNITED STATES OF AMERICA,

Plaintiff-Respondent,

v.

ANTHONY M. PALERMO,

Defendant-Appellant.

Before:

HINCKS, PICKETT and MOORE, *Circuit Judges.*

Appeal from the United States District Court for the Southern District of New York, Edward J. Dimock, *Judge.*

EARL J. McHUGH, Assistant United States Attorney, New York City (PAUL W. WILLIAMS, United States Attorney, and CHARLES H. MILLER, Assistant United States Attorney, New York City, on the brief), *for Plaintiff-Respondent.*

WYLLYS S. NEWCOMB, New York City (ROYALL, KOEGEL, HARRIS & CASKEY, and JOHN A. WELLS, ROBERT E. FRISCH, ANDREW L. CLARK and BURTON N. BROMSON, New York City, on the brief), *for Defendant-Appellant.*

PICKETT, Circuit Judge:

The defendant, Anthony M. Palermo, a New York doctor, was convicted on each of three counts of an indictment charging him with wilfully attempting to evade and defeat his personal income taxes for the years 1950, 1951 and 1952, in violation of Section 145(b), Internal Revenue Code of 1939. During the course of the trial, a demand was made by the defendant for the production of a written memorandum prepared by Internal Revenue Agents sometime after a conference between them and a witness who subsequently testified for the Government at the trial.¹ The trial court denied the request on the ground that the memorandum was not of the character which was required to be produced under the provisions of Title 18, U. S. C. A., Section 3500.² The right of the defendant to inspect and use the memorandum is the single question presented by this appeal.

During the investigation of the defendant's income for the years in question, the Internal Revenue Agents took the sworn testimony of the accountant whose firm had prepared his tax returns. After the testimony was transcribed, the accountant again appeared before the agents to read and sign the transcript of his testimony. Some corrections were noted and an affidavit to effect the changes was made and executed. Shortly after the meeting was concluded, a memorandum of what had taken place at the meeting was prepared by the agents and placed in the Government files. It referred to the correction affidavit and stated that the witness gave further oral information in answer to ques-

¹ The memorandum was marked "Court's Exhibit 2" and is part of the record in this Court.

² This section was enacted shortly after the decision of the United States Supreme Court in *Jencks v. United States*, 353 U. S. 657. Its purpose was to fix standards by which statements and reports of a witness in the possession of the Government should be made available to a defendant in a criminal prosecution after the witness had testified.

tions. The additional information contained in the memorandum also concerned the preparation of defendant's tax returns and related to subject matters about which the accountant later testified. A copy of the sworn testimony and the supplemental affidavit, together with the witness' testimony before the grand jury, were delivered to defendant's attorneys.

We do not agree with defendant's contention that under the provisions of Section 3500 the memorandum should have been made available to him. The term "statement," as used in the Section, refers to "(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement." It is quite apparent from the record that this memorandum was made from memory by one of the agents and was not intended to be a "substantially verbatim recital" of anything said by the witness. It was merely a summary of the agent's recollection of what had transpired at the meeting. The witness had not signed, adopted or approved it. It does not appear that the memorandum was a transcript of notes taken during the interview or that it purported to be a recorded verbatim recital, or nearly so, of what the witness had said. The declared purpose of the statute was "to provide for the production only of written statements previously made by a Government witness in the possession of the United States which are signed by him or otherwise adopted or approved by him, and any transcriptions or recordings of oral statements made by the witness to a Federal law officer, relating to the matter as to which the witness has testified." U. S. Code Cong. and Adm. News, 85th Congress, First Session, 1957, page 1862. This would include, we think, memoranda prepared by Government agents of oral statements made to such

agents by Government witnesses, which are shown to be a substantially verbatim recital of oral statements contemporarily recorded by the agent.³ The evident purpose of the statute is to limit the right of inspection for use in cross-examination to reasonably accurate or authenticated statements and reports, for which the witness, not the Government agent, is responsible. The document in question does not come within this category.

The defendant further contends that, even though production of the memorandum is not required by the provisions of Section 3500, he is, under the rule of *Jencks v. United States*, 353 U. S. 657, entitled to have it produced for his use. In the *Jencks* case, Government witnesses who were in the employ of the United States made numerous written and oral reports to the F. B. I. concerning their activities with the Communist Party. The court held that the Government must produce for inspection all written reports of the witnesses and also the oral reports as recorded by the F. B. I., touching the events and activities to which they testified at the trial. There the Court was dealing

³ When the Bill was discussed on the floor of the United States Senate, the following colloquy occurred:

"Mr. Revercomb: Does the definition of 'records' which have been made or which must be produced, include memoranda made by an agent of the Government or any other statement which may have been obtained and signed?"

"Mr. O'Mahoney: I think it would include a memorandum made by an agent of the Government of an oral statement made to him by a Government witness, but not by a third party. * * *

"Mr. Javits: As a practical matter, then, what has been done with the so-called records provision is to tie it down to these cases in which the agent actually purports to make a substantially verbatim recital of an oral statement that the witness has made to him—not the agent's own comments or a recording of his own ideas, but a substantially verbatim recital of an oral statement which the witness has made to him, and as transcribed by him; is that correct?"

"Mr. O'Mahoney: Precisely." 103 Cong. Rec. 16488 (1957).

with written and oral reports made to superiors, by former Communists who had been employed by the United States to do undercover work. It developed after the trial that much of the testimony given by one witness was recanted as deliberately false. The broad language used by the Court ⁴ was interpreted differently by lower courts and by attorneys.⁵ The enactment of Section 3500 followed in the wake of this decision. Although the Committee reports indicate that the legislation was "not designed to nullify, or to curb, or to limit the decision of the Supreme Court insofar as due process was concerned," or to permit the prosecution to withhold competent and relevant statements and reports which might be of value to a defendant in the cross examination of a witness, its purpose was to provide a procedure and establish the rules and conditions under which trial courts shall direct the production of statements or reports of witnesses in the possession of the United States. Without considering whether there is a conflict between the *Jencks* decision and the requirements of Section 3500, we hold that the legislation is the exclusive standard in this field and controls the procedure to be followed in

⁴ In speaking of the particular reports under consideration in the *Jencks* case, the Court said:

" * * * We now hold that the petitioner was entitled to an order directing the Government to produce for inspection all reports of Matusow and Ford in its possession, written and, when orally made, as recorded by the F. B. I., touching the events and activities as to which they testified at the trial. We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less." (Footnote omitted) 353 U. S. 657, 668-9.

⁵ For examples see U. S. Code Cong. and Adm. News, 85th Congress, First Session, 1957, pages 1862-9.

such cases.⁶ Otherwise, the legislation is meaningless. *Bergman v. United States*, 6 Cir., 253 F. 2d 933; *Lohman v. United States*, 6 Cir., 251 F. 2d 951.

Affirmed.

⁶ The Committee reports on the legislation indicate that Congress looked with favor upon Chief Judge Moore's analysis of the *Jencks* decision in *United States v. Anderson* (E. D. Mo., 1957), 154 F. Supp. 374, 375-6, which reads as follows:

"(1) Before the Defendant in a criminal cause is entitled to production and inspection of a statement made by a person other than himself in the possession of the United States—(a) such person must have been called as a witness by the United States, (b) the Defendant must establish on cross examination that a statement was made by such witness, (c) that such statement is in the possession of the United States, and (d) that such statement touches the events and activities related in his direct examination.

"(2) Such statement must either have been (a) written by the witness himself, or, (b) recorded by someone acting for the United States.

"Category (b) includes only continuous, narrative statements made by the witness recorded verbatim, or nearly so, by persons acting for the United States, and does not include notes made during the course of an investigation (or reports compiled therefrom) which contain the subjective impressions, opinions or conclusions of the person or persons making such notes.

"(3) When any document contains material which a defendant, having made the preliminary showing set out in (1), is entitled to see, and, also contains matters which he is not privileged to see, the United States need furnish only that portion or portions, which he is entitled to see and may retain the balance."

See U. S. Code Cong. and Adm. News, 85th Congress, First Session, 1957, pages 1865-6.

**Copy of Opinion in Bergman v. United States,
253 F. 2d 933, decided by the United States
Court of Appeals for the Sixth Circuit on
March 12, 1958, and Rehearing Denied
April 23, 1958**

STEWART, Circuit Judge.

Tried by jury in the district court, the appellants were convicted of violating Title 18 U. S. C. A. §§ 2314 and 2315, by receiving and transporting in interstate commerce goods which they knew had been stolen, feloniously converted or taken by fraud, and of conspiracy to violate the said criminal statutes. Upon these consolidated appeals many errors are claimed in the trial court's admission and exclusion of evidence, instructions to the jury, and other rulings.

Two principal contentions, however, emerge from the briefs and oral argument. First, it is claimed that the proof was insufficient to show that the goods which were received and transported had been obtained by any of the unlawful means referred to in the criminal statutes in question. Secondly, it is contended that in the light of *Jencks v. United States*, 1957, 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103, the district court erred in not permitting defense counsel to inspect prior statements made to the Federal Bureau of Investigation by witnesses who testified for the government.

The goods which the appellants were charged with receiving and transporting were automobile parts that in 1952 had been shipped in four separate loads from Willys-Overland Motors, Inc., to the appellant Phillip Weiss in Toledo, Ohio. Since for the reasons stated below we have concluded that the judgments must be set aside, it is unnecessary to embark upon a review of the conflicting evidence as to the circumstances under which the goods in question left the Willys-Overland plant. Suffice it to say

that while the appellants are correct in their contention that the evidence did not show that a common law larceny had been committed, such a showing was not necessary to sustain a conviction. *United States v. De Normand*, 2 Cir., 1945, 149 F. 2d 622; *United States v. Handler*, 2 Cir., 1944, 142 F. 2d 351.

The issue as to whether the goods were obtained by one of the unlawful methods of acquisition referred to in the statutes is not to be decided upon the basis of technical common law definitions. See *United States v. Turley*, 1957, 352 U. S. 407, 77 S. Ct. 397, 1 L. Ed. 2d 430; *United States v. De Normand*, supra; *United States v. Handler*, supra. While, of course, we cannot know whether the evidence to be produced at a new trial will be sufficient to support convictions, there is enough in the present record to prevent a determination at this time that any of the appellants are entitled to directed verdicts of acquittal. Cf. *Yates v. United States*, 1957, 354 U. S. 298, 332-333, 77 S. Ct. 1064, 1 L. Ed. 2d 1356.

We come then to the ground upon which we have concluded that a new trial is required. Six employees of Willys-Overland testified on behalf of the government. The general subject of their testimony related to the manner in which Phillip Weiss had secured possession of the automobile parts—a subject which was a central issue in the case. Five of these six witnesses said that they had given statements to the F. B. I. in 1952 or early in 1953 covering the subject matter of their testimony. Defense counsel made a timely demand for the production of each of the five statements for use in cross examination.

In a conscientious effort to follow the law as it then appeared to be, the trial court adopted the following principles in passing upon counsel's requests for the witnesses' prior statements: 1. If the witness had used the statement to refresh his recollection, the statement would be made available to defense counsel. 2. If the witness had not used the statement to refresh his recollection,

the court would examine the statement to determine whether its contents were inconsistent with the witness's testimony. 3. If the court determined that the statement was inconsistent with the witness's testimony the statement would be made available to defense counsel. 4. If the court found that the statement was not inconsistent with the witness's testimony the statement would not be made available to defense counsel.

Applying these standards, the court made available to the defense the prior statements of three of the government witnesses and a substantial part of the statement of a fourth. But the prior statement of one witness, Chitwood, was not turned over to defense counsel.

Several months after the judgments of conviction were entered, the Supreme Court decided *Jencks v. United States*, 1957, 353 U. S. 657, 77 S. Ct. 1007, 1 L. Ed. 2d 1103. In that case the Court expressly disapproved the procedure adopted by the district court here. 353 U. S. at page 669, 77 S. Ct. at page 1013. In the light of the *Jencks* decision, the failure of the district court to make Chitwood's prior statement available to the defense requires that the judgments be set aside.¹ We reach this conclusion with reluctance in view of the likelihood that the failure to make Chitwood's statement available actually worked no prejudice to the defendants, and in view of the generally conscientious and fair conduct of the long and complicated trial by the district judge.

Upon a second trial the recently enacted statute implementing the rule of the *Jencks* case will govern the procedure to be followed. 18 U. S. C. A. § 3500; *Lohman v. United States*, 6 Cir., 1958, 251 F. 2d 951.

The judgments are vacated and the case remanded to the district court for a new trial.

¹ The fact that Chitwood's statement may have been unsigned is immaterial, if it was "otherwise adopted or approved by him," or, if orally made, it was a substantially verbatim contemporaneous recording. *Jencks v. United States*, 353 U. S. at page 668, 77 S. Ct. at page 1013; 18 U. S. C. A. § 3500.

ON PETITION FOR REHEARING

Per Curiam.

Upon consideration of the petition for rehearing, we are of opinion that it is not proper for this court to determine whether the appellants were prejudiced by failure to make available the prior statement of a witness, any more than it would be proper for the trial court to determine whether a prior statement of a witness should be turned over to defense counsel on the basis of whether the statement is inconsistent with the witness's testimony in open court.

The petition for rehearing seems to imply that the Jencks case removed this function from the district court only to place it within the province of the Court of Appeals. We are not disposed to adopt that view, and accordingly the petition for rehearing is denied.

18 U. S. C. § 3500

§ 3500. DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified in direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject

matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement," as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub. L. 85-269, Sept. 2, 1957, 71 Stat. 595.

United States Constitution

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

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NO. 471

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In the Supreme Court of the United States

OCTOBER TERM, 1958

ANTHONY M. PALERMO, PETITIONER

v.

UNITED STATES OF AMERICA

***On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Second Circuit***

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

CHARLES K. RICE,
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UNITED STATES OF AMERICA

*On Petition for a Writ of Certiorari to the United States
Court of Appeals for the Second Circuit*

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. 13-18) is reported at 258 F. 2d 397.

JURISDICTION

The judgment of the Court of Appeals was entered on August 18, 1958 (R. 439a),¹ and a petition for rehearing was denied on September 25, 1958 (R. 453a). The petition for a writ of certiorari was filed on October 24, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

¹ R. references are to the printed appendix to the petitioner's brief in the Court of Appeals, as supplemented by the proceedings in that Court.

QUESTION PRESENTED

Whether it was error to refuse to allow defense counsel to inspect and use for cross-examination a memorandum written by a Government agent who had conferred with a witness for the prosecution when that memorandum had not been signed by or exhibited to the witness and was not a substantially verbatim, contemporaneous recording of what the witness had said.

STATUTE INVOLVED

The Act of September 2, 1957 (71 Stat. 595, 18 U.S.C., Supp. V, 3500) provides:

Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testi-

mony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the

court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

STATEMENT

On February 3, 1958, a judgment of conviction was entered against the petitioner for wilful, attempted income tax evasion for the years 1950, 1951 and 1952. He had been convicted after a 26-day trial before a jury in the Southern District of New York. Judge Dimock sentenced the petitioner to three concurrent terms of 2 years imprisonment. He is presently free on \$5,000 bail. (R. 4a-5a, 10a-11a.)

The evidence showed that the petitioner understated his income and taxes for the years 1948 through 1952. The evasion for the years 1950, 1951 and 1952, involved \$55,487.18 (over 54%) in income (Ex. 652),

and in excess of \$30,000 in taxes.² All of the unreported income discovered in this case was derived from the petitioner's operations in the stock market (Ex. 646).

Some of the stock and brokerage accounts were held or maintained in the names of the petitioner's mother (Exs. 29, 38-42, 53-59, 71-76, 95-105, 129-132, 152 and 153), his niece (Exs. 20, 298), and a friend of long standing and for some time an employee (Exs. 646, 651; Tr. 119-120).³ None of the nominees received any dividends or capital gains from these transactions (Tr. 74, 110-115, 119-123). During the years involved the petitioner received \$3,815.27 in dividends and \$7,608.54 in taxable capital gains (this figure includes only 50% of long-term capital gains) on stock carried in his mother's name (Exs. 650, 651; Tr. 1326-1328). During all of these years, the petitioner took a personal exemption on his tax returns for his mother's support, and disclosed none of "her" income on his tax returns (Exs. 1-5).

The accounting firm of Arthur R. Sanfilippo & Company kept books pertaining to the petitioner's real estate holdings and prepared his state and federal tax returns. Arthur R. Sanfilippo, a certified public accountant and principal partner in the firm, was the petitioner's brother-in-law. Through the

² Government exhibits referred to herein have been lodged with this Court.

³ Tr. refers to the reporter's transcript of the trial, on file with this Court.

years Sanfilippo had acted as petitioner's tax consultant, advising him that capital gains and dividends were taxable, and discussing tax matters each year before the returns were prepared (R. 25a-27a).

On July 16, 1956, Sanfilippo gave a statement to the Internal Revenue Service. On August 23, 1956, he read and signed the transcription of the statement which he had given earlier. At the same time, to correct errors made in the July 16, 1956, statement, Sanfilippo executed an affidavit. (Pet. 14; Tr. 784, 785.) Some hours after the meeting was over, the agents made a memorandum of what took place at this August 23, 1956, meeting (See Court's Ex. 2, pp. 1, 4).

On cross-examination of the witness Sanfilippo, the petitioner demanded and was given (1) the minutes of the witness' testimony before the grand jury, (2) a copy of the witness' testimony under oath given to the Internal Revenue Service on July 16, 1956,⁴ and (3) the witness' August 23, 1956, affidavit. The trial judge refused to turn over to the petitioner the agent's memorandum of the August 23, 1956, meeting. Instead the court ordered the memorandum sealed as Court's Exhibit 2; the exhibit was considered by the Court of Appeals in reaching its decision, and is now certified to this Court.

⁴Sanfilippo had already provided the petitioner with his copy of the July 16, 1956, statement (Tr. 993).

ARGUMENT

The petitioner contends that he was entitled to inspect and use on cross-examination the memorandum made by the agents of what took place on August 23, 1956, at the meeting with the witness Sanfilippo. Petitioner first argues (Pet. 10) that the provisions of 18 U.S.C. 3500, *supra*, pp. 2-4, required that the agent's memorandum be turned over to him for inspection and for purposes of cross-examination, and that the court below too narrowly construed the statutory provision which requires that the statement be a "substantially verbatim recital" and "recorded contemporaneously".

Following this Court's decision in *Jencks v. United States*, 353 U.S. 657, Congress enacted the statute which became 18 U.S.C. 3500, to provide the procedure and establish the rules and conditions under which trial courts should direct the production of statements or reports of government witnesses (Pet. 17). Precise standards were set up in the statute defining the following kinds of statements or reports which must be produced: (1) written statements, signed, adopted or approved by the witness; (2) stenographic, mechanical, electrical or other recording, and transcriptions thereof which (a) must be a substantially verbatim recital of a witness' oral statement, and in addition (b) must be recorded contemporaneously with the making of the oral statement.

It is not disputed that the agent's memorandum (Court-Ex. 2) was not signed, approved or otherwise adopted by the witness. As the court below said (Pet. 15), it is quite apparent from the record that the mem-

orandum was made from memory; that it was merely a summary of the agent's recollection, and that it does not appear that the memorandum was a transcript of notes made at the interview. As is apparent from the face of the memorandum, it does not purport to be a transcript or even a complete summary of what was said by the witness during the meeting; and it was not prepared until some hours after the conference. (Court Ex. 2, pp. 1, 4.) It was thus not a substantially verbatim recital of what the witness said at the meeting and it was not recorded contemporaneously with the making of the oral statement. The court below was correct in finding that the agent's memorandum did not meet either of the two standards provided by the statute for production and use in cross-examination of a "statement" of a witness.

The petitioner further contends (Pet. 10) that even if the memorandum does not meet the requirements of 18 U.S.C. 3500, nevertheless the latter statute is not the exclusive standard governing inspection of alleged "statements" (Pet. 9), and that the petitioner has such a right of inspection under the principles laid down in *Jencks v. United States*, 353 U.S. 657. This Court, in *Jencks*, was passing upon a specific case involving written reports, and records of oral reports, made by persons whose duty it was to make reports to the Government. Since the matter was not in issue, it was assumed for the purposes of that case that the records of the oral reports represented the actual statements given by the witnesses. Moreover, it seems inferable that the F.B.I. record-

ing was in fact contemporaneous with the making of the oral statements. *United States v. Lev*, 258 F. 2d 9, 13, fn. 1 (C.A. 2), pending on petition for writ of certiorari, No. 435. This Court thus had no occasion in *Jencks* to define precisely what constituted an oral or written report or statement of a witness, and it did not do so.

Contrary to the petitioner's allegation (Pet. 10-11), there is no conflict between the decision in this case and that rendered by the Court of Appeals for the Sixth Circuit in *Bergman v. United States*, 253 F. 2d 933 (Pet. 19-22). The Sixth Circuit in a footnote (Pet. 21) made only passing reference to the issue and in doing so assumed that the statement of that witness came within the standards set up by 18 U.S.C. 3500.

Finally, the petitioner contends (Pet. 11) that failure to furnish him with the agent's memorandum deprived him of due process of law under the Fifth Amendment to the Constitution. The petitioner does not show how failure to provide a defendant with a Government agent's memorandum of the agent's recollection from memory of what had taken place at a meeting with the witness could deprive petitioner of any constitutional right. The memorandum is hearsay as to the witness. There is no recognized rule of evidence under which the petitioner would be entitled as of right to such a document, consisting only of notes or a memorandum made by a third party which the witness has not adopted as his own statement or which the evidence does not show to be in fact his own statement.

As to reports which this Court held in *Jencks* the defendant was entitled to have, the Court's holding

was not based on constitutional considerations. Rather, it announced a procedural and evidentiary rule to be followed in the trial of criminal cases in the federal courts. *United States v. Gandia*, 255 F. 2d 454, 455 (C.A. 2); *United States v. Spangelet*, 258 F. 2d 338 (C.A. 2); *Scales v. United States*, decided October 6, 1958 (C.A. 4), pending on petition for writ of certiorari, No. 488.

With respect to such reports or statements used in cross-examination, this Court has emphasized the value for impeaching purposes of "The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment * * *." *Jencks v. United States*, 353 U.S. 657, 667. If the witness is to be held accountable for a statement's omissions, contrasts in emphasis and order of treatment alleged to be different from that of his testimony given from the witness stand, justice requires that the statement in fact be his own. To allow a witness' testimony to be tested on the basis of a memorandum prepared by a Government agent which is not in fact the statement of the witness would introduce an extraneous element into cross-examination, which cannot be considered necessary in order to assure a fair trial. If such a change in trial procedure is to be made, we believe Congress should make it. This it deliberately refrained from doing in the so-called *Jencks* law. 18 U.S.C. 3500.⁵

⁵ We have discussed this aspect of the legislative history of the law at pages 24 to 27 of the brief in opposition in *Lev v. United States*, No. 435, this Term.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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NOVEMBER, 1958.

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IN THE

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October Term, 1958

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ANTHONY M. PALERMO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

Opinion Below

The opinion of the Court of Appeals (R. 425-430) is reported at 258 F. 2d 397.

Jurisdiction

The judgment of the Court of Appeals was entered on August 18, 1958 (R. 430), and a petition for rehearing was denied on September 25, 1958 (R. 438). The petition for a writ of certiorari was filed on October 24, 1958 and was granted on December 8, 1958 (R. 440). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Constitutional Provision and Statute Involved

Amendment V to the United States Constitution provides:

“No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia; when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.”

Section 3500, Title 18, United States Code provides:

“§ 3500. DEMANDS FOR PRODUCTION OF STATEMENTS AND REPORTS OF WITNESSES.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified in direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

(e) The term 'statement,' as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement. Added Pub. L. 85—269, Sept. 2, 1957, 71 Stat. 595."

Questions Presented

The questions presented are:

1. Whether Section 3500 of Title 18, U. S. C., authorizes a defendant in a criminal case to inspect those portions of a memorandum made by a government agent in which the government agent sets forth the substance of certain oral statements made to the government agent by a witness, where the following facts appear:

- (a) The witness was called by the government and gave important testimony against the defendant;
- (b) The witness had been questioned by the government agent on exactly the same subject matters on a prior occasion;
- (c) The agent had made, within a few hours after this conference with the witness, a detailed memorandum in which, without direct quotation, he set forth the substance of what the witness said to him on the subject matters in question; and
- (d) The defendant, having the witness under cross-examination, moved for an order directing the government to permit defense counsel to inspect those portions of the memorandum in which the agent had recorded the substance of what the witness had said as to the same subject matters.

2. Whether, if it be held that Section 3500 of Title 18, U. S. C., does not authorize inspection under the circum-

stances described above, Section 3500 is exclusive and prohibitory so as to require the trial court to deny an appropriate, timely motion to inspect.

3. Whether, if it be held that Section 3500 of Title 18 U. S. C. is not exclusive and prohibitory, a motion to inspect, made under the circumstances described above, should be granted on the authority of the decision of this Court in *Jencks v. United States*, 353 U. S. 657, or because required by the fair and proper administration of justice in the federal courts, or both.

4. Whether, if it be held (a) that said Section 3500 does not authorize the granting of the defendant's motion to inspect under the circumstances described above, and (b) that said Section 3500 actually prohibits the granting of such motion, said Section 3500, as so construed and applied, constitutes a deprivation of the petitioner's right to due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

Statement

Petitioner was convicted on three counts of wilful attempt to evade and defeat federal income taxes under Section 145(b) of the Internal Revenue Code of 1939, 26 U. S. C., Section 145(b), covering the years 1950, 1951 and 1952. He was sentenced to two years' imprisonment, and directed to pay costs in the amount of \$2,729.20.

The issues raised on this appeal arose under the following circumstances:

Petitioner was on trial for criminal tax evasion. The government's case was based upon omissions of income from dividends and capital gains, none of which were in dispute. The sole issue to be determined by the jury was

whether the omissions resulted from a willful plan and scheme of tax evasion.

It was undisputed that petitioner's returns were not prepared by him in whole or in part. As team doctor for one of the major league baseball teams, petitioner was required each year to be away from home during the annual Spring training trip of the team. He regularly left New York in February and did not return until April. (R. 324-329.)

The evidence was clear that the returns were signed in blank by the petitioner each year prior to leaving for Spring training. (R. 10, 40, 189, 193-194, 318-319; Exs. S, YY, CCC, C-4, N-5.)

Admittedly the returns were prepared and filed by a firm of certified public accountants. The preponderance of the evidence was that the work on the returns was actually done after petitioner had left for the Spring training trip.

It appeared that the accounting firm had been preparing petitioner's returns for upwards of twenty-five years and that the procedure followed with respect to the years which were the subject matter of the indictment was not in any material respect different from the procedure followed in other years.

The senior partner of the accounting firm was one Arthur R. Sanfilippo, who was the petitioner's brother-in-law.

Neither in the indictment nor upon the trial did the government contend that there was a conspiracy between the petitioner and the accountants. On the contrary, the government's case depended upon the proposition that petitioner's tax evasion "scheme" was deliberately and willfully to supply false information to the accountants, either by giving the accountants information which the

petitioner knew to be false, or by willfully withholding and concealing information from them, or both. (R. 9-12.)

In broad outline, the defense was that the petitioner withheld nothing from his accountants; delivered to them all his bank statements, cancelled checks, brokerage statements and other pertinent records and documents from which proper returns could and should have been prepared; never saw the returns before or after they were filed; had no occasion to tote up his personal balance sheet nor personally to figure out his income from a tax standpoint and had neither knowledge nor notice that the returns were incorrect in any respect. There was a very substantial amount of evidence, consisting of oral testimony from any witnesses and significant documentary evidence, to support defendant's position. Were it not for the testimony of the accountants, or could the jury have been persuaded to reject that testimony, the defense might well have persuaded the jury that criminal intent had not been established beyond a reasonable doubt.

Sanfilippo, as the senior partner of the accounting firm, was therefore the principal and indispensable witness for the government.

On direct examination he testified, in substance, that the only function of himself and his firm was to make computations and fill out petitioner's tax returns on the basis of "figures submitted" by the petitioner. Sanfilippo denied that either he or his firm ever undertook to act as petitioner's professional tax advisors or to see to it that accurate returns were prepared. Sanfilippo even denied that any compensation was paid to him or his firm for the preparation of the returns.

In detail, Sanfilippo, together with his partner, Anthony V. Amoruso (the second most important government witness) placed upon the petitioner specific responsibility for every material omission in the returns. Wherever figures

set forth in the returns were erroneous, Sanfilippo and Amoruso swore that those specific, detailed figures were given to them orally by petitioner, principally over the telephone, and that this was done in each instance before the petitioner left New York for the Spring training trip. Where omissions from the returns were shown, the accountants testified that they had no knowledge or notice of the items omitted. The more damning aspects of their testimony were wholly without corroboration.

Much of this type of testimony could be and was shown by the defense to be completely false. This was accomplished through the oral testimony of past and present employees of the accounting firm and by documentary evidence. But it was not possible for the defense to produce distinterested or documentary contradiction of all of the testimony of Sanfilippo and Amoruso. There thus remained a large area in which the uncorroborated testimony of Sanfilippo, and to some extent Amoruso, was fatal to the petitioner if accepted by the jury.

The most important document in the case was Government Exhibit 6. It was a record kept by the petitioner himself of dividends of a certain type or class, i.e., dividends on personally held stocks as distinguished from stocks held in margin accounts with brokers. It was begun in January, 1951 and, in the form in which it was received in evidence upon the trial, had been filled out through 1952. The dividends listed on this exhibit for 1951 were so substantially in excess of the total dividends in that category reported in the 1951 return that, if the jury were satisfied that petitioner had withheld this document from the accountants, conviction was altogether likely.

The defense contention was that the exhibit, which then contained only the 1951 items, had been delivered to the accountants early in 1952, for use in preparing the 1951 return. According to the defense, failure to include these

dividend items in the 1951 return was due to carelessness or mistake on the part of the accounting firm or, what was more likely, a failure of communication between the partners in the accounting firm.* There was very substantial evidence supporting the petitioner's position as to this document. A completely disinterested witness, called by the government itself, testified that she saw and worked on Exhibit 6 in the office of the accounting firm early in 1952. There was persuasive circumstantial evidence pointing in the same direction (R. 288-293).

On direct and cross-examination Sanfilippo denied that the document had been delivered to him or his firm prior to the preparation of the 1951 return. Instead he asserted, by way of an admittedly "refreshed recollection", that it was first delivered to him at a much later date under circumstances which, if the witness was believed by the jury, were damning in the extreme (R. 27-28, 149-152).

Thus, the truth or falsity of the witness' testimony in general and in particular with respect to Government Exhibit 6 was vital to both the prosecution and the defense. If the witnesses' testimony could not be overcome by the defense, Exhibit 6 offered tremendous support for the

* In that particular year, Sanfilippo happened to be away during tax time. In January, 1952, before leaving for California, Sanfilippo caused the accounting firm to file, on petitioner's behalf, an amended Declaration of Estimated Tax for 1951 and caused the petitioner to pay the Collector of Internal Revenue the additional sum of \$4,000 on account of 1951 tax. Six weeks later, both Sanfilippo and the petitioner being away, Amoruso prepared the final return (on the form previously signed in blank by the petitioner). As filed by Amoruso, the final return ignored the dividends shown on Exhibit 6, with the result that the final return showed an over-payment of 1951 tax amounting to \$4,031.63. The Amended Declaration of Estimated Tax was roughly consistent with the dividends shown on Exhibit 6; the final return, prepared and filed a few weeks later by the same accounting firm but by a different partner, was completely inconsistent with both Exhibit 6 and the amended Declaration of Estimated Tax.

Government's theory of the whole case, i.e. that petitioner's tax evasion technique was to withhold information from and thus deceive his accountants. If, on the other hand, Sanfilippo's testimony as to the time when Exhibit 6 was delivered to him should be rejected by the jury, the exhibit constituted even more powerful support for the defense theory. In such case the independent direct and circumstantial evidence indicating that Exhibit 6 had been delivered to the accounting firm early in 1952 would stand uncontradicted and, together with the exhibit itself, would strongly show (1) that the petitioner did indeed deliver to his accountants the basic records necessary for the preparation of accurate returns; (2) that the accounting firm was so negligent and inept as to ignore substantial income of which the firm actually had knowledge; and (3) that Sanfilippo's testimony on this vital point was false and obviously the result of the pressure of circumstances and determination on his part to commit perjury rather than face the professional consequences of the negligence of himself and his firm.*

Throughout the trial the defense contended:

(a) That the accounting firm was fumbling, negligent and utterly incapable of handling tax accounting of the complexity of that required in the case of the petitioner;

(b) That because the petitioner was a relative of the senior partner and substantial fees could not be charged petitioner's work was given only the sketchiest attention by the accounting firm;

* Each return had been personally certified by either Sanfilippo or Amoruso. The accounting firm could not escape the responsibility of having prepared the returns while the petitioner was away on Spring training trips, nor of having done so on forms signed in blank. Sanfilippo and his partner held so-called "Treasury cards". If Sanfilippo, Amoruso and their firm were to escape disciplinary action by the Treasury Department and probable destruction of their professional careers, it was essential that they fasten upon the petitioner sole responsibility for each and every omission.

(c) That, as the evidence showed and in some instances the government conceded, many of the omissions from the petitioner's returns were clearly the result of inexperience, lack of professional skill, error and negligence on the part of the accounting firm; and

(d) That, being on the horns of a dilemma, Sanfilippo and his partner were lying to save their own necks.

On cross-examination of Sanfilippo, the defense brought out that the witness had been questioned on several prior occasions in the course of the investigation which led to the indictment (R. 150).

It appeared that on August 23, 1956 there was a conference between the witness and Special Agent Harper, the agent conducting the tax investigation (R. 151). The interview lasted two hours or more. There was discussed, among other things, Exhibit 6 and the time when it was first delivered by petitioner to the witness (R. 151-152). There was also discussed a material and important change in the witness' position as to Exhibit 6. The witness had previously given testimony under oath to the effect that he did not remember the exhibit at all and was unable to say when it had been received by him. Nor had he been able to recall whether or not the exhibit had been delivered to him by the petitioner prior to preparation of the 1951 return. At the conference with Special Agent Harper on August 23, 1956 the witness was shown a copy of the 1951 return and called upon to compare the figures in the return with the figures in the exhibit. He then signed an affidavit to the effect that this comparison indicated to him that the exhibit had not been delivered until after the preparation of the 1951 return (R. 151-152). Significantly, the affidavit did not state that Sanfilippo's recollection had been refreshed; or that he had any recollection at all. Thus the affidavit (a) constituted a change in his earlier testimony, and (b) was significantly different from the unequivocal,

utterly damning testimony given by him for the government on the trial.

Exactly what took place at the conference of August 23, 1956, how the affidavit came to be drawn, by whom it was drawn, why it went as far as it did, why it did not go farther and what Sanfilippo said to the agent that day thus becomes of great importance.

Although the defense has never been afforded an opportunity to inspect any portion of the memorandum, and although the government has, even if the proceedings in the Court of Appeals, been extremely (and we think unfairly) guarded in revealing the nature of the contents of the memorandum, it has conceded that the memorandum is a lengthy one; that it was made by Special Agent Harper on the same day and within "some hours after the conclusion of the conference"; that it sets forth "what transpired" at the conference between Sanfilippo and Special Agent Harper; that it refers among other things to "the kind of records and information submitted by Palermo to Sanfilippo and his firm and the occasion of these submissions," obviously including Exhibit 6 and the time when it was delivered to the witness; and that it sets forth "what transpired" between Sanfilippo and Special Agent Harper in the interview as to other material subject matters as to which the witness testified for the government upon the trial.

In the course of the cross-examination of the witness, while he was being questioned about the interview with Special Agent Harper on August 23, 1956, the defense made a timely and appropriate motion to inspect those limited portions of Harper's memorandum which set forth what the witness had said to Harper (R. 153). After extensive argument the motion was denied (R. 153-160).

The Court of Appeals affirmed. The opinion of that Court stated that Section 3500, Title 18, U. S. C., had estab-

lished the exclusive standard for production of prior statements of government witnesses and that the statements demanded were not within the statute. It stated that the memorandum was not a "substantially verbatim recital" of the witness' statements and, although it is not clear from the opinion, apparently the Court of Appeals held that the "recording" was not prepared "contemporaneously". It declined to consider whether Section 3500, Title 18, U. S. C., as construed by the trial court and the Court of Appeals, is in conflict with the decision of this Court in *Jencks v. United States, supra*. Not expressly but by necessary implication, the Court of Appeals declined to follow the decision of the Court of Appeals for the Sixth Circuit in *Bergman v. United States*, 253 F. 2d 933.

The opinion of the Court of Appeals further indicates that in considering and evaluating the decision of this Court in *Jencks v. United States, supra*, the Court of Appeals was greatly influenced by the assumed fact that Matusow and Ford, the government witnesses in that case, had, by the time this Court rendered its decision, been thoroughly discredited.

In the petition for rehearing (R. 431), petitioner asked that his counsel be afforded an opportunity to examine the pertinent portions of the agent's memorandum in order to be able intelligently to present the defendant's side of the case. The petition for rehearing further requested clarification of the opinion of the Court of Appeals on the point of what constituted a "substantially verbatim recital" as set forth in Section 3500, Title 18, U. S. C. It also sought clarification of the opinion of the Court of Appeals on the question of when a statement is "recorded contemporaneously" within the meaning of the same section. And finally, on petition for rehearing, the petitioner requested the Court of Appeals specifically to consider whether the decision of this Court in *Jencks v. United States, supra*, re-

quires that petitioner be afforded the inspection sought as a matter of simple justice and fair play, having an important bearing on the administration of justice in the federal courts. The petition for rehearing also raised the question of due process of law and the applicability of the Fifth Amendment of the Constitution of the United States, as had been done in the Court of Appeals and at the trial. Rehearing was denied, without opinion on September 25, 1958 (R. 438).

SUMMARY OF ARGUMENT

In summary form petitioner's points are as follows:

1. The inspection sought by petitioner upon the trial was expressly within the grant of § 3500, Title 18, U. S. C., within the provisions, and should have been granted thereunder.

2. Section 3500, Title 18, U. S. C. was not intended to and does not prohibit inspection of the substance of an oral statement made by a government witness to a government agent relating to the same subject matters as were testified to by the witness upon the trial even though the statement be held not to have satisfied in all respects the requirements of § 3500.

3. The inspection sought below should clearly have been granted on the authority of the decision of this Court, in *Jencks v. United States*, 353 U. S. 657.

4. If construed and applied as to prohibit inspection under the circumstances here presented, Section 3500, Title 18, U. S. C. deprives the petitioner of due process of law and is violative of the Fifth Amendment of the Constitution of the United States.

5. By reason of the refusal of the trial court to grant inspection as sought by the petitioner under the circumstances herein, the judgments below must be reversed and a new trial granted.

POINT I

Petitioner was entitled to inspection under Section 3500, Title 18, U. S. C.

It is submitted that § 3500 clearly provides for the inspection sought by petitioner.

In the language of the statute, what Sanfilippo said at the conference was "an oral statement made by said witness"; he was a "witness called by the United States"; the statement was made "to an agent of the Government"; the memorandum of the government agent, to the extent that it set forth the substance of what Sanfilippo said, constituted an "other recording"; admittedly the statement related "to the subject matter" of the testimony of the witness on direct examination; to the extent that the memorandum contained the substance of a single statement made by the witness to the agent, the memorandum constituted a "substantially verbatim recital" of an oral statement and the statement was "recorded contemporaneously" in that, as conceded by the Government, the memorandum was prepared by the agent on the same day that the statement of the witness was made, and within a few hours thereafter.

The government contends, and the Court of Appeals in effect has held, that the statute should be narrowly construed. It is said that the statement was not "recorded contemporaneously" because it does not appear to have been recorded simultaneously. Presumably on the theory that the agent's memorandum contains other matters and does not purport to be a continuous, narrative recitation of the witness's entire statement, it is argued that the requirement of "a substantially verbatim recital" is not met.

These contentions are not convincing. In view of the decision of this Court in *Jencks v. United States*, 353 U. S. 657, and of the avowed intention of the Congress not "to

nullify, or to curb, or to limit" that decision, so narrow and artificial an interpretation of the statute is unjustified.

It follows that the plain language of the statute should be respected and the petitioner's right to inspection affirmed.

POINT II

Section 3500, Title 18, U. S. C., does not prohibit the granting of inspection under the circumstances presented.

It is submitted that, even if it be held that § 3500, 18 U. S. C. does not affirmatively grant inspection to a defendant under the circumstances here existing, it certainly does not prohibit such inspection.

There is absolutely nothing in the statute itself which indicates that Congress intended to limit inspection only to documents falling within its express language. There is a prohibitive feature of the statute, but it relates merely to pre-trial proceedings (See Par. (a), § 3500), and has no application to the instant case.

Had Congress intended that the remaining sections and subdivisions of the statute should have a prohibitory effect, it could readily have inserted appropriate language to that end. It is submitted that under basic principles of statutory construction the inclusion of a mandatory prohibition in the first paragraph and the omission of any such prohibition in the remaining paragraphs requires the conclusion that the remaining paragraphs were not intended to deny to a defendant an inspection to which he would be entitled on other grounds and under other circumstances. If, it is submitted, petitioner was entitled to inspection under the decision of this Court in *Jencks v. United States*, then there is nothing in the statute which says that inspection must be denied.

POINT III

Inspection was required by the decision of this Court in *Jencks v. United States*, 353 U. S. 657.

Regardless of § 3500, it is submitted that petitioner's motion to inspect should have been granted on the authority of *Jencks v. United States*, 353 U. S. 657, *supra*.

The reasoning and underlying philosophy of *Jencks* applies to statements of government witnesses in whatever form they were made, i.e. both written and oral. Similarly it applies to any form in which the statements of government witnesses were recorded by government agents. As used in *Jencks* (353 U. S. at page 668), there is no magic in the word "recorded", nor did this Court intend thereby to place upon its decision a narrow, limited concept of what constitutes a recording.

An examination of the record in *Jencks* reveals that the Court had before it precisely the same factual situation as exists in the instant case, namely an oral statement by the witness recorded in a memorandum made by a government agent. Although the principal reference in the opinion of this Court is to written reports made by Ford and Matusow, the record in *Jencks* establishes that the witness Ford had made oral statements to the F.B.I. which were not dictated to a stenographer and were not "taken down by a shorthand reporter". All that occurred, according to Ford, was that "some notes were taken" by the F.B.I. agents.*

It thus appears that when this Court said (353 U. S. at p. 668) that the Government should have been required to produce for inspection "all reports of Matusow and Ford in its possession, written, and when orally made, as recorded by the F.B.I.", this Court was referring to the oral statements made by Ford to F.B.I. agents.

* See pp. 164, 165, 166 and 170 of the record in this Court in *Jencks v. United States*.

We therefore assert that the instant case is not merely within the general rationale and doctrine of *Jencks* but is specifically covered by the decision in that case.

To illustrate the striking parallel between the two cases, we set forth below a tabular, analytical comparison between the factual situation in the instant case and that involved in *Jencks*.

<i>Aspect or Subject Matter</i>	<i>Record in Jencks</i>	<i>Record in Palermo</i>
Crime Charged	§ 1001, Title 18	§ 145(b), Title 26
Government Witness	Ford	Sanfilippo
Government Agents	F. B. I.	Intel. Div. I.R.S.
Type of Statement by Witness	Oral	Oral
Type of Recording or Transcription thereof	Agent's Notes or Memorandum	Agent's Memorandum; Record Silent as to possible Notes
Contemporaneously Recorded	Yes	Yes
Did Memorandum Record What Witness Said	Presumably	Yes
Timely and Appropriate Motion	None as to Oral Statements	Yes
Related to Testimony on Direct	Yes	Yes
Materiality and Importance	None Shown	Clear

As we read the decision in *Jencks*, it is not incumbent upon the petitioner, if the denial of the motion of petitioner to inspect was error, to establish that the error was prejudicial before receiving a new trial. By reason of the position taken by the government and in view of certain

decisions by the Court of Appeals for the Second Circuit,* petitioner argued the issue of prejudicial error extensively in the Court of Appeals. In view of the fact that the Court of Appeals did not even mention the point in its decision and opinion, we deem it unnecessary to labor the point again here, particularly since it seems self-evident that error on so vital an issue as the time when Government Exhibit 6 was delivered to Sanfilippo and the accounting firm could not help but be prejudicial. Should the government, however, raise the issue we shall deal with it in our reply brief.

POINT IV

If construed and applied to deprive the petitioner of the right of inspection under the circumstances here existing, Section 3500, Title 18, U. S. C. is unconstitutional and in violation of the Fifth Amendment of the Constitution of the United States.

As we have seen, the factual situation in the instant case is identical with that presented in *Jencks*. If § 3500, Title 18, U. S. C. is so construed and interpreted as to require a different result in the instant case, it is respectfully submitted that the statute is unconstitutional and void.

We earnestly submit that this is a question of simple justice and fair play. The government, under the circumstances here existing, could not in justice ask the jury to convict the petitioner on the testimony of the witness Sanfilippo, particularly Sanfilippo's testimony relating to the time when Government Exhibit 6 was delivered to the accounting firm, and at the same time deny to the petitioner access to what Sanfilippo had said to Special Agent Harper

* *United States v. Miller*, 248 F. 2d 163 (2nd Cir., 1957), cert. den. 355 U. S. 905.

United States v. Sheba Bracelets, 248 F. 2d 134 (2nd Cir., 1957), cert. den. 355 U. S. 904.

on that same subject matter, as recorded in a memorandum in the government's possession at the time of the trial.

It is quite true that the decision in *Jencks* was not placed on constitutional grounds. A decision as to whether due process was involved was not necessary to the result in the case. But if § 3500 is construed to prohibit the inspection sought in the instant case, we submit the due process is involved, and the issue must be decided in favor of petitioner.

CONCLUSION

The decision below must be reversed and a new trial granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 471

ANTHONY M. PALERMO, PETITIONER

v.

UNITED STATES OF AMERICA

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (R. 425-430) is reported at 258 F. 2d 397.¹

JURISDICTION

The judgment of the Court of Appeals was entered on August 18, 1958 (R. 430-431), and a petition for rehearing was denied on September 25, 1958 (R. 438). The petition for a writ of certiorari was filed on October 24, 1958, and granted on December 8, 1958 (R. 440). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether it was error to refuse to allow defense counsel to inspect and use for cross-examination a

memorandum written by Government agents who had conferred with a witness for the prosecution, where such memorandum had not been signed by or exhibited to the witness and was not a substantially verbatim, contemporaneous recording of what the witness had said.

STATUTE AND RULES INVOLVED

The so-called "Jencks" Act of September 2, 1957 (71 Stat. 595, 18 U.S.C., Supp. V, 3500) provides:

Demands for production of statements and reports of witnesses.

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this

section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. If, pursuant to such procedure, any portion of such statement is withheld from the defendant and the defendant objects to such withholding, and the trial is continued to an adjudication of the guilt of the defendant, the entire text of such statement shall be preserved by the United States and, in the event the defendant appeals, shall be made available to the appellate court for the purpose of determining the correctness of the ruling of the trial judge. Whenever any statement is delivered to a defendant pursuant to this section, the court in its discretion, upon application of said defendant, may recess proceedings in the trial for such time as it may determine to be reasonably required for the examination of such statement by said defendant and his preparation for its use in the trial.

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the

interests of justice require that a mistrial be declared.

(e) The term "statement", as used in subsections (b), (c), and (d) of this section in relation to any witness called by the United States, means—

(1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

(2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.

Federal Rules of Criminal Procedure:

Rule 26. *Evidence*

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congress or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Rule 51. *Exceptions Unnecessary*

Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires

the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

Rule 52. *Harmless Error and Plain Error.*

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

* * * * *

STATEMENT

On February 3, 1958, after a 26-day trial, petitioner (a physician practicing in New York) was convicted in the United States District Court for the Southern District of New York of wilful attempted income tax evasion for the years 1950, 1951 and 1952, and was sentenced to three concurrent terms of 2 years' imprisonment (R. 4-5, 8-9). The Court of Appeals affirmed (R. 430-431).

The issue now presented to this Court arose in connection with the cross-examination of a Government witness, Arthur R. Sanfilippo. Accordingly, in order to put the issue in proper factual perspective, we shall set forth, first, the evidence bearing generally on petitioner's alleged tax evasion, and, secondly, the specific facts relevant here in connection with the cross-examination of Mr. Sanfilippo.

THE EVIDENCE OF EVASION

On December 19, 1956, after investigation of petitioner's tax liability had been under way for four years (R. 12), he filed amended income tax returns declaring unreported income and unreported taxes

for the years 1950, 1951, and 1952, as follows (Tr. 2-15, Exs. 1, 2, 3, 1a, 2a, 3a):¹

NET INCOME

Year	Original returns	Amended returns	Additional
1950.....	\$18,939.51	\$47,497.74	\$28,558.23
1951.....	9,107.90	31,963.55	22,855.65
1952.....	18,291.09	38,254.56	19,962.87
	46,339.10	117,715.85	71,376.75

TAXES

Year	Original returns	Amended returns	Additional
1950.....	\$5,507.48	\$27,485.47	\$15,977.99
1951.....	1,908.37	13,755.15	11,756.78
1952.....	5,625.09	16,128.37	10,503.28
	13,100.94	\$1,368.99	38,268.05

The figures used by the Government at the trial, eliminating items about which there was or may have been insufficient evidence of evasion motive, such as errors of the accountants (Exs. 646, 647; Tr. 1338-1359, 1378-1379, 1383-1387), showed failure to report, for the years 1950, 1951, and 1952, \$55,487.18 (over 54%) in income (Ex. 652; Tr. 1404-1406), and almost \$29,000 in taxes (Tr. 1408-1418; Exs. 1-3). The pattern of under-reporting by petitioner of his taxes extended also at least to the additional years 1948 and 1949 (Exs. 4, 5, 4a, 5a). All of the alleged unreported income was derived from petitioner's operations in the stock market, either from dividends or capital gains (Ex. 652; Tr. 1400-1406).

Petitioner maintained brokerage accounts or held stock in the names of the following nominees: Peti-

¹ Government exhibits referred to herein have been lodged with this Court. "Tr." references are to the reporter's transcript of the trial, also on file with the Court.

tioner's mother (Exs. 29, 38-42, 53-59, 71-76, 95-105, 129-132, 152 and 153; R. 20; Tr. 74); his niece (Exs. 20, 298; Tr. 110-119); and one Catherine Brady Schultz, an old friend and employee of the petitioner (Exs. 267, 329, 646, 651; Tr. 119-124). None of these nominees had control over the purchase or sale of the stock (Tr. 74, 115, 121; R. 379-380). The endorsement of the nominees' names on the dividend checks was made by petitioner (Tr. 1326-1328). None of the nominees received any of the dividends or capital gains from these transactions, which were collected entirely by petitioner (Tr. 74, 110-115, 119-124). Petitioner's accountants, who made up his returns, were not informed of the receipts (R. 30-31, 211; Tr. 1275), and none of this income from the stock held in the name of nominees was reported on petitioner's tax returns (Ex. 646; Tr. 1337-1338, 1355, 1390, 1401-1403). During the indictment years, petitioner received \$3,815.27 in dividends and \$7,608.54 in taxable capital gains (this figure includes only 50% of long-term capital gains) on stocks carried in his mother's name (Exs. 650, 651; Tr. 1401-1403). During these same years, petitioner took a personal exemption on his tax returns for his mother's support, but disclosed none of the income, nominally hers, on his tax returns (Exs. 1-3).

Petitioner's stocks were of two classes: (1) stocks bought on margin, the stock certificates being held by the stockbrokers, where the brokers' statements showing the dividends on such margin account stocks were submitted by petitioner to his accountants, the ac-

countants summarizing the total of these dividends for use on the tax returns (R. 27, 29-30, 57-58, 190, 196, 239; Tr. 926) and (2) stocks held personally by petitioner and registered in his name (or in the name of a nominee) where a figure as to the amount of the dividends was furnished by the petitioner to his accountants (R. 31, 61-62, 190, 196-197; Tr. 569).² Beginning at least as early as 1948, petitioner followed the practice of orally telling his accountants the amount of dividends on personally held stock (R. 31). A large part of the under-reporting arose from dividends on personally held stocks where the petitioner had supplied a fictitiously low figure to the accountants. Thus, in 1950 petitioner told his accountants he had received \$4,000 in dividends on such stock (R. 166-167; Tr. 569), whereas he had actually received \$18,644.70 (Tr. 1336; Exs. 646, 647); in 1951 petitioner told his accountants he had received an aggregate of \$3,800 in dividends on such stocks (R. 196-197; see R. 190), whereas he had in fact received \$20,228.78 (Tr. 1346; Exs. 646, 647).³ Up to and including the 1950 tax year, petitioner had always sub-

² Some bank statements and cancelled checks (R. 111, 171, 267) and some broker's statements of cash transactions involving personally held stock (R. 29, 32, 58-61, 73, 76, 171, 288) were submitted by petitioner to his accountants; however, they were never complete and were furnished for the purpose of computing capital gains or bank interest.

³ The 1952 return was prepared and filed in 1953 after the investigation of petitioner had begun in December 1952 (R. 12-13). While petitioner considerably increased for 1952 the amount of dividend income he reported on personally held stock, he reported dividends totalling only \$21,855.18 on such stock when he had actually received \$27,393.36 (Exs. 646, 647; Tr. 1348-1349).

mitted a lump sum figure for his personally held stock (R. 61).

CROSS-EXAMINATION OF GOVERNMENT WITNESS

SANFILIPPO

The accounting firm of Arthur R. Sanfilippo & Company prepared petitioner's state and federal tax returns. Arthur R. Sanfilippo, a certified public accountant and principal partner in the firm, was petitioner's brother-in-law (R. 15-16; Tr. 272-273). For many years Mr. Sanfilippo had acted as petitioner's tax consultant, advising him generally on tax matters and specifically informing him that capital gains and dividends were taxable (R. 16-18, 21-23). Petitioner furnished the information for the preparation of the tax returns, with the exception of petitioner's real estate income (R. 21, 37-38, 104, 195, 242; Tr. 298-299; 606). The Sanfilippo firm, which kept the real estate books and records, supplied the figures for the real estate income on the tax returns (R. 104; Tr. 298-299, 606, 968). While the employees in the Sanfilippo office generally compiled the information for preparation of the returns, Mr. Sanfilippo or his partner, Mr. Amoruso (R. 66), checked the drafts of the returns, after they were completed, for omissions or errors (R. 36-37, 58-59, 95, 100-102, 341, 353-354, 361). In preparing petitioner's tax returns the Sanfilippo firm was not engaged to conduct an audit of his financial affairs (R. 42, 57-58, 103-104, 112-113).

* For one of the years for which the petitioner was indicted, 1951, petitioner had signed his return in blank and the figures were thereafter inserted, by the accountants (R. 40, 189, 230; see R. 288).

On July 16, 1956, Mr. Sanfilippo had submitted to interrogation under oath before the Internal Revenue Service with respect to petitioner's tax liability. On August 23, 1956, Mr. Sanfilippo examined and signed the 44-page transcription of such interrogation (Ex. Y-7; R. 96). On that date he also executed a supplemental affidavit (Ex. Z-7) to clarify certain portions of his July 16, 1956, statement. Some time after the conclusion of this meeting with Mr. Sanfilippo on August 23, 1956, the Internal Revenue agents made a memorandum of the meeting, which was placed in the files of the Service (R. 426-427).

At the trial, on cross-examination of the witness Sanfilippo, who had testified for the Government, petitioner demanded and was furnished (1) the minutes of the witness' testimony before the grand jury (Ex. W-7; Tr. 486);⁵ (2) the witness' question-and-answer statement given under oath to the Internal Revenue Service on July 16, 1956 (Ex. Y-7); and (3) the witness' August 23, 1956, supplemental affidavit (Ex. Z-7) (Tr. 545-546).⁶ When the petitioner also demanded the Internal Revenue agents' memorandum of the August 23, 1956, meeting, the trial judge refused to turn it over to him (R. 159). Instead, the court ordered the memorandum sealed and marked as Court's Exhibit 2 (R. 159-160; Tr. 801-803); the exhibit was part of the record before the Court of Appeals and was considered by it in reach-

⁵ The Government objected to the production of the grand jury minutes (Ex. W-7), but the District Court ordered that they be produced. (Tr. 486).

⁶ Copies of petitioner's Exhibits W-7, Y-7 and Z-7, all for identification, have been lodged with the Court.

ing its decision (R. 426-427); it is now certified to this Court.

Mr. Sanfilippo had been questioned by the agents, and later at the trial by Government counsel and by petitioner's counsel, about Exhibit 6, a form printed by Steiner, Rouse & Company with blank spaces provided for insertion of amounts, dates and description of dividends and interest received. Exhibit 6 contained notations of petitioner's dividends (R. 155; Br. 8), pertaining only to stocks personally held by him and not to stocks held by brokers which had been bought for petitioner on margin (Tr. 1349-1350). During the course of the investigation, petitioner had told an Internal Revenue agent that the handwriting on the Steiner, Rouse form (Ex. 6) was his, but stated that he could not recall when he had given it to his accountants (Tr. 78). Exhibit 6 is filled out for the year 1951 and for all or nearly all of the year 1952; attached to it are various sheets of paper including two adding machine tapes, one showing the total of dividends received for 1951, and the second showing the total of dividends received for all or nearly all of 1952, as taken from the figures entered on the form (Ex. 6).

Mr. Sanfilippo had stated in the July 16, 1956, interview that he had no recollection about the Steiner, Rouse form (Ex. 6), which had been found among his firm's workpapers for the year 1952, other than that the pencilled notations on the adding machine tapes attached to the form (Ex. 6) appeared to be in his handwriting; he believed the form (Ex. 6) was submitted by petitioner; but he had no recollection

tion whether petitioner had submitted it before or after the commencement of the investigation; and he could not account for the fact that the tape indicated dividends from personally held stocks amounting to \$16,269 in 1951, whereas taxpayer had reported a total of \$13,575 in dividends from all stocks, including those held by brokers.

Mr. Sanfilippo stated the following in the supplemental affidavit of August 23, 1956 (Ex. Z-7): The affidavit was being executed to clarify his answers given on July 16, 1956; he believed that he had pre-

The questions and answers of Mr. Sanfilippo in respect to Exhibit 6 were as follows (Ex. Y-7, pp. 32-33; see R. 145-147):
“(Off the record discussion.)

Q. There is among the work papers for the year 1952 a form printed by Steiner, Rouse and Company, which is a schedule of dividends and interest, which shows dates and initials of stock and amounts for the years 1951 and 1952, and there is also attached adding machine tapes for these two years. Tell me whether that was part of your work papers or not.

(Form submitted to witness.)

A. I have no recollection other than the notations at the top of each of the tapes appear to be my writing.

Q. Do you know whose writing that schedule is?

A. I believe submitted to us by Dr. Palermo.

Q. When did he submit that schedule?

A. I do not know.

Q. Would you know whether it was before the commencement of the investigation by the Internal Revenue or after?

A. I have no recollection.

Q. The taxpayer reported dividends in 1951 of \$13,575 and that tape indicates the total of \$16,269. Could you explain that?

A. I cannot account for this.

Q. You do not know when you first saw this schedule?

A. No, I don't.

Q. You did see it before though?

A. I have no recollection of it aside from this pencilled notation on top of each of the machine tapes being in my handwriting.”

viously qualified his answers regarding the form (Ex. 6) in an "off the record discussion" on July 16, 1956; from examination of the Steiner, Rouse form (Ex. 6) and copies of petitioner's tax returns for 1951 and 1952, it appeared to Mr. Sanfilippo that he had received the form (Ex. 6) from petitioner after commencement of the investigation; he recalled that the Internal Revenue agent had requested additional information concerning dividends and he believed that petitioner then had supplied Mr. Sanfilippo with the form (Ex. 6) with the notations of dividends.*

* Mr. Sanfilippo's August 23, 1956, affidavit (Ex. Z-7) reads as follows (R. 151-152):

"I appeared at the office of the Intelligence Division, Internal Revenue Service on July 16, 1956 and was interviewed under oath by Special Agent Eugene W. Harper in connection with the income tax liability of Dr. Anthony M. Palermo.

"I wish to clarify a portion of that statement appearing on Pages 32 and 33 with reference to a form printed by Steiner, Rouse & Company entitled "Schedule of Dividends and Interest" which was among my work papers and which shows a schedule of dividends of Dr. Palermo for the years 1951 and 1952. Attached to this form were adding machine tapes totaling \$16,269.78 in 1951 and \$21,565.18 in 1952. I stated on July 16, 1956 that the handwriting on these tapes was mine; that I had no recollection of seeing it before; and therefore I could not say when I first saw this form.

"I wish now to comment further on this schedule of dividends. I believe that at the time I qualified my answers in an "off the record discussion" as shown on Page 32. I wish at this time to qualify and clarify my answers. It appears from examination of the Steiner, Rouse form and photostatic copies of Dr. Palermo's tax returns for 1951 and 1952 that I received this form with the notations of dividends from Dr. Palermo after Revenue Agent Mishler had commenced his examination of Dr. Palermo's returns. I recall that Mr. Mishler requested additional information concerning the Doctor's dividend income and I believe that Dr. Palermo supplied me with this form with the notations of dividends at that time."

At the trial, Mr. Sanfilippo testified, in accordance with his recollection in the supplemental affidavit, that petitioner had furnished him with the Steiner, Rouse form (Ex. 6) in 1953 after the Internal Revenue agent had found discrepancies in petitioner's 1951 dividend income and had requested additional information (R. 27, 41, 62, 80-84, 140-142, 150). Thereafter, Mr. Sanfilippo had used the 1952 figures found on the form (Ex. 6) for preparation of petitioner's 1952 return since it was on hand at the time the 1952 return was prepared (R. 31, 82-83).

Mr. Sanfilippo was extensively cross-examined about Exhibit 6 (R. 62-63, 80-84, 140-151), and was specifically examined about his July 16, 1956, statement (Ex. Y-7) that he had no recollection as to when petitioner had given him the Steiner, Rouse form (Ex. 6) (R. 144-151). Mr. Sanfilippo was also confronted with his supplemental affidavit of August 23, 1956, *supra* (R. 151-152). On cross-examination, Mr. Sanfilippo explained that the information contained in the supplemental affidavit (Ex. Z-7) was arrived at about the same time as when he gave his original testimony on July 16, 1956 (R. 150-151), and that after his July 16, 1956, interview with the agents he had talked with his partner, Mr. Amoruso, concerning what the Steiner, Rouse form (Ex. 6) had to do with petitioner's income tax returns, and as a result of this conversation his memory had been refreshed so that he then clearly recalled that Exhibit 6 had not been received until the early part of 1953 (R. 148-150).

Mr. Sanfilippo had been absent from New York during the time that petitioner's 1951 return was being

prepared (R. 39-40, 66-67, 167; Tr. 817-818, 861). The Sanfilippo partner, Mr. Amoruso, who had known petitioner for about thirty years (R. 184), secured the information from petitioner for use in preparation of the latter's 1951 return (R. 195-197, 226, 262). Mr. Amoruso testified at the trial that he had personally received from petitioner the additional amounts aggregating \$3,800 for 1951 dividends on petitioner's personally held stock, which figure was used in computing the total amount of his dividends (R. 196-197). Mr. Amoruso further stated that while he had seen the Steiner, Rouse form in 1953 (Ex. 6) when they were preparing petitioner's 1952 tax return, he had not seen it during the time that he was preparing petitioner's 1951 tax return (R. 209) in early 1952 (R. 197).

SUMMARY OF ARGUMENT

I

The sole issue in this case is whether reversible error was committed in denying petitioner's request for production of Court's Exhibit 2 for cross-examination of Government witness Sanfilippo.

In requesting production, petitioner disclaimed any contention that production was authorized under 18 U.S.C. 3500, the so-called "Jencks" Act. His sole argument was that he was entitled to the document under the principles declared in *Jencks v. United States*, 353 U.S. 657. In denying production, the trial court ruled that the statute provided the exclusive criteria for determining whether production of such a document was required under the circumstances.

It is the Government's position, more fully de-

veloped in our brief in No. 435-437, *Lev. et al. v. United States*, that in enacting 18 U.S.C. 3500 Congress properly established a federal rule of criminal procedure prescribing exclusive standards for determining when a "statement" or "report" of a Government witness to an agent, in the possession of the United States, is required to be produced at the trial.

Under the statutory procedure, a summary of prior oral statements prepared by the Government agents, and which has not been approved by the witness, is not a "statement" which must be produced for cross-examination of such witness. As the Court of Appeals held, and as the description of the document itself clearly indicates, Court's Exhibit 2 is such a summary.

II

In the circumstances of this case, even if it be assumed that production of Court's Exhibit 2 should have been required, the failure to do so was not prejudicial to petitioner.

The situation here is quite unlike that in *Jencks*. Here, petitioner received, and extensively used in cross-examination, other voluminous pre-trial statements of the witness. These other statements not only were more reliable than the hearsay document embodied in Court's Exhibit 2, but they were equally close in point of time to the events to which they relate. The witness in this case was friendly and related to the defendant, and cooperated with defense counsel throughout the investigation. An examination of Court's Exhibit 2 and the other pre-trial statements, all of which are before this Court, will dem-

onstrate that Court's Exhibit 2 is merely cumulative and repetitious, and any error in denying its production was clearly harmless in the present circumstances.

ARGUMENT

I

AS A SUMMARY OF PRIOR ORAL STATEMENTS WHICH WAS NOT APPROVED BY THE WITNESS, COURT'S EXHIBIT 2 WAS PROPERLY EXCLUDED FROM PRODUCTION FOR PURPOSES OF CROSS-EXAMINATION

The sole issue in this case is whether the trial court committed reversible error in denying petitioner's request for production of Court's Exhibit 2 for purposes of cross-examining Government witness Sanfilippo.

In considering the correctness of this ruling, it should be noted at the outset that Court's Exhibit 2 was requested as a document concededly not authorized to be produced under 18 U.S.C. 3500. Thus, after the document which has become Court's Exhibit 2 was requested "for use in cross-examination of Mr. Sanfilippo", the trial court examined it, and referring to the limitations of 18 U.S.C. 3500, inquired of defense counsel how he hoped to bring himself within the statute (R. 153). Defense counsel replied (R. 153):

I do not hope to bring myself within it; I do not think I belong within it.

Defense counsel then proceeded to argue that under this Court's prior decision in *Jencks v. United States*, 353 U.S. 657, he was entitled to the document even though it was not a statement authorized to be pro-

duced under 18 U.S.C. 3500; that in enacting this legislation with respect to the production of documents for cross-examination of Government witnesses Congress did not preempt the field; and that, if it did, the statute was unconstitutional (R. 154-158).

It was such a request that the trial court denied, ruling that 18 U.S.C. 3500 properly established exclusive criteria for determining whether production was required under the circumstances. Whether that ruling constituted reversible error is the single question before this Court.*

* A party is required to make known to the court, at the time the ruling of the court is made or sought, not only the action which he desires the court to take or his objection to the action of the court, but also the grounds therefor. Rule 51, Federal Rules of Criminal Procedure, *supra*, pp. 4-5. After the trial judge ruled against petitioner on the specific ground advanced by him for production of Court's Exhibit 2, he cannot be heard to argue on appeal that production of the exhibit would have been proper on a different ground. This is so for the same reasons that a defendant is precluded from first raising on appeal a different reason for exclusion of evidence than that advanced to the trial judge. *United States v. Sing Kee*, 250 F. 2d 236, 242 (C.A. 2d), certiorari denied, 355 U.S. 954; *Smith v. United States*, 224 F. 2d 58, 61 (C.A. 5th), certiorari denied, 350 U.S. 885; *Chin Gum v. United States*, 149 F. 2d 575 (C.A. 1st); I Wigmore, *Evidence*, Sec. 18 (C) (1). Even when an objection to the ruling has been properly made in the trial court but not pressed in the Court of Appeals, only in exceptional circumstances will this Court review the propriety of the ruling. *Lawn v. United States*, 355 U.S. 339, 362, fn. 16; *Husty v. United States*, 282 U.S. 694, 701-702; *Duignan v. United States*, 274 U.S. 195, 200. Accordingly, the specific disavowal by petitioner in the trial court of any claim that he was entitled to Court's Exhibit 2 under the provisions of 18 U.S.C. 3500 prevents him from being heard to make such an argument on review.

In this connection, it is important to point out that if in the trial court petitioner had taken issue with, rather than

As set forth more fully in Point I of the Government's brief on the merits in Nos. 435-7, *Lev, et al. v. United States*, at pp. 30-61, Congress, in enacting 18 U.S.C. 3500, established a federal rule of criminal procedure providing exclusive standards for determining whether a "statement" or "report" of a Government witness to an agent, in possession of the United States, must be produced for use in impeaching the witness on cross-examination. Both the language and the legislative history of the statutory provisions make it clear that Congress, in response to this Court's holding in *Jencks v. United States*, 353 U.S. 657, promulgated a rule which would govern future application of the *Jencks* principle. Congress decided that there should be required to be produced for impeaching a particular Government witness on cross-examination only those prior statements which were fairly attributable to that witness. Congress also made the judgment, and accordingly provided, that the only written versions of prior oral statements which were fairly attributable to the witness were (a) those which he had approved or adopted; and

accepted without challenge, the Government's position that Court's Exhibit 2 was not a document required to be produced under 18 U.S.C. 3500, any deficiencies in the record on that question could have been supplied. For example, if there should be any doubt whether Mr. Sanfilippo had approved or adopted Court's Exhibit 2 as his own statement, or whether that document constituted a substantially verbatim recording of Mr. Sanfilippo's prior oral statements, the record could have been amplified to remove such doubt if petitioner had contended at the trial that the document constituted a "statement" as defined in 18 U.S.C. 3500. See *Giordenello v. United States*, 357 U.S. 480, 488.

(b) those which constituted substantially verbatim recordings of his prior oral statements.

As we show in Nos. 435-7, the reasonableness of this legislative judgment is patent—it prevents a witness from being confronted with prior, allegedly inconsistent, statements which cannot be reliably said to be his. In the absence of such a rule, a trial of the guilt or innocence of an accused could degenerate into a confusing and time-consuming, if not impossible, attempt to determine collateral issues relating to the true authorship of statements sought to be attributed to particular witnesses. It is well settled—under decisions of this Court—that it was within the constitutional power of Congress to establish such a reasonable federal rule of criminal procedure.

Under this statutory rule, an investigator's condensed summary of a witness' prior oral statements—which by its very nature is obviously not a substantially verbatim recording—is excluded from production for purposes of impeaching that witness on cross-examination unless the summary has been approved or adopted by the witness. Notwithstanding petitioner's trial concession with respect to Court's Exhibit 2 (*supra*, p. 17), the Court of Appeals examined that document, as had the trial court, and concluded that it was a summary of prior oral statements which was not approved by the witness, a type of document which, as we have shown, is excluded from production under 18 U.S.C. 3500. That conclusion is plainly correct.¹⁰

¹⁰ On the propriety of *in camera* inspection, see the Brief for the United States in No. 451, *Rosenberg v. United States*, at pp. 42-62.

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The four-page conference memorandum which has been sealed as Court's Exhibit 2 (R. 159-160) was aptly described by the Court of Appeals as follows (R. 427) :

It is quite apparent from the record that this memorandum was made from memory by one of the agents and was not intended to be a "substantially verbatim recital" of anything said by the witness. It was merely a summary of the agent's recollection of what had transpired at the meeting. The witness had not signed, adopted or approved it. It does not appear that the memorandum was a transcript of notes taken during the interview or that it purported to be a recorded verbatim recital, or nearly so, of what the witness had said.

The memorandum, consisting of only *fifty-five type-written lines*, relating to a conference which the heading indicates lasted *three and one-half hours*, is obviously not a substantially verbatim recording. Nor was it approved or adopted in any manner by Government witness Sanfilippo; it was signed only by Agent Harper, sometime after the conference, and later by Agent McGowan. It is merely their summarized version of prior oral statements. Under the legislative standards established in the "Jencks" Act, it is not fairly attributable to Government witness Sanfilippo, and not subject to compulsory production.

II

IN THE CIRCUMSTANCES OF THIS CASE, ANY ERROR IN DENYING PRODUCTION OF COURT'S EXHIBIT 2 WAS NOT PREJUDICIAL TO PETITIONER

Assuming *arguendo* that the trial court erred in denying petitioner's request for production of Court's Exhibit 2 as a document not authorized to be produced under 18 U.S.C. 3500, there remains the question whether in the circumstances of this case such error was prejudicial to petitioner. Rule 52(a), Federal Rules of Criminal Procedure, *supra*, p. 5; *Lutwak v. United States*, 344 U.S. 604, 619-620; *Kotteakos v. United States*, 328 U.S. 750.

As pointed out in our brief in Nos. 435-437, *Lev, et al. v. United States*, pp. 77-80, this Court's decision in *Jencks* did not abrogate the harmless error doctrine insofar as it relates to cases involving production of documents for cross-examination of Government witnesses. The very fact that *Jencks* did not overrule *Goldman v. United States*, 316 U.S. 129, suggests that *Jencks* did not deprive trial courts of all discretion whatsoever in requiring production of documents, particularly in a situation where, unlike that in *Jencks*, other documents were furnished for cross-examination and the additional documents sought (but not produced) were merely cumulative. Indeed, subsequent to *Jencks* this Court held in *Lawn v. United States*, 355 U.S. 339 (fn. 16, p. 362), that the trial court's denial of a request to produce certain pre-trial statements of a Government witness, where the defense already had other pre-trial statements of the

witness, would not be considered plain error affecting substantial rights without a showing of exceptional circumstances.

The circumstances in which production was denied in *Jencks* were quite unlike those in this case. In *Jencks*, the defense was not armed with other pre-trial statements of the witnesses; the unproduced documents were not merely cumulative but rather were essential if the defense was to be in any position to confront the witnesses with pre-trial statements which might be at variance with their trial testimony. The unproduced documents in *Jencks* were not only deemed to be authentic statements of the witnesses themselves but those statements appeared to be the only ones recording the events before time might have dulled the witnesses' memories. The Government witnesses in *Jencks* were not friendly or related to, or shown to have been cooperating with, the defendant, but rather were hostile to the defense. In *Jencks*, the unproduced documents had not been exhibited to and examined by the courts below; accordingly, those courts could not discharge any duty of determining whether denial of production had been harmless. In the instant case, we submit, the entirely different facts require a different result.

Although the trial court denied petitioner's request for production of Court's Exhibit 2 for cross-examination of Government witness Sanfilippo,¹¹ defense

¹¹ The testimony on direct examination of both Sanfilippo and his partner, Amoruso, was not uncorroborated, as petitioner suggests. (Br. 7-8.) On the contrary, there was a considerable body of oral testimony and documentary evidence corroborating the testimony of the two accountants, such as the

counsel did receive, and fully used in unrestricted cross-examination of the witness, other lengthy, pre-trial statements covering the same subject matter. Petitioner was furnished with transcriptions of the actual statements which the witness Sanfilippo had previously given to the Government agents concerning his knowledge of petitioner's income tax matters, the 44-page question-and-answer statement taken from Mr. Sanfilippo (Ex. Y-7), and the clarifying affidavit of August 23, 1956, executed by Mr. Sanfilippo at the same time he signed the question-and-answer statement (Ex. Z-7), as well as his 34-page grand jury testimony (Ex. W-7). These other statements were more reliable, being the actual verbatim statements of the witness; they were also equally close in point of time to the events to which they relate; moreover, they had the additional quality of being given under oath, whereas the agent's summary (besides being hearsay as to the witness) was not so made.

Because of the great latitude allowed him by the trial court, petitioner's counsel was able to conduct a vigorous defense, particularly in his cross-examination of the Government witnesses. Sanfilippo, whose direct and redirect examination took only parts of two trial days and 113 pages of the reporter's trial transcript (Tr. 272-351, 912-944), was cross-examined for a period of six trial days covering over 500 pages of the reporter's trial transcript (Tr. 351-402, 434-
accountants' original workpapers which were identified by other witnesses (R. 31, 83, 98, 102, 108, 117, 166-167, 185, 186, 196-197, 270-271, 279-280, 285-287, 322, 330, 337, 362, 365, 383).

464, 487-785, 804-912, 944-958), particularly as to his prior question-and-answer statement (Ex. Y-7), the clarifying affidavit (Ex. Z-7) (R. 96-97, 144-152), and Exhibit 6 (the Steiner, Rouse form) (R. 62-63, 80-84, 140-151).¹² Due to the trial court's leniency in these matters, the petitioner was able to exploit to the utmost the witness Sanfilippo's failure at the July 16, 1956, meeting fully to identify the Steiner, Rouse

¹² Petitioner says that a "completely disinterested witness, called by the government itself" testified that she saw and worked on Exhibit 6 in 1952 (Br. 9). What the petitioner does not say is that the witness, a Mrs. LaCombe, who was pregnant and admittedly frightened and nervous (Tr. 1289, 1299), had told the Government prosecutor that she had worked on Exhibit 6 after a Mr. DeGeorge had begun working in the Sanfilippo firm (R. 289, 292; see also Tr. 1291), and the latter did not begin working for the firm until at least November 1952 (R. 278), long after the 1951 tax return had been prepared. Thus, it would have been impossible for the witness to have worked on Exhibit 6 in connection with the 1951 return if it was used during a period when Mr. DeGeorge worked for the firm. The petitioner also does not mention that, the next day after the witness testified, the Government prosecutor requested permission to recall the witness and stated that since completion of the witness' testimony the prosecutor had talked with the witness who told him that her testimony was unintentionally wrong because in fact she was unable to fix the dates when she worked on Exhibit 6. The defense counsel opposed recalling the witness and the trial judge refused permission (Tr. 1283-1311). These facts must be noted in view of the attempt by the petitioner to capitalize on what was clearly mistaken testimony.

Moreover, unless it be assumed that the Steiner, Rouse form was passed back and forth between the petitioner and the Sanfilippo firm, and there was no testimony to that effect, it was impossible for the Sanfilippo firm to have had Exhibit 6 on hand in time for preparation of the petitioner's 1951 tax return in early 1952, since there are forty dividend entries on Exhibit 6 which bear dates on and after April 1, 1952.

form (Ex. 6), which had been found with the workpapers associated with the 1952 return. (R. 144-151.)¹³

The extent of cross-examination is, of course, within the sound discretion of the trial court. *Alford v. United States*, 282 U.S. 687, 694. To hold that the trial court's refusal to turn over the agent's summary of the meeting with Sanfilippo constituted reversible error would be tantamount to finding an abuse of discretion where, in actual fact, the actions of the trial judge in turning over Sanfilippo's grand jury

¹³ Even though Sanfilippo was originally unable to recall the details as to Exhibit 6, his prior statements, considered together, are in no way inconsistent with his trial testimony in which he did identify Exhibit 6.

Mr. Sanfilippo explained on his cross-examination that the information contained in the August 23, 1956, affidavit was first recalled at about the same time that he gave his original statement on July 16, 1956. *Supra*, p. 14. This trial testimony is corroborated by Mr. Sanfilippo's August 23, 1956, affidavit (Ex. Z-7), which states that he had previously qualified the answers which he had given on July 16 on this subject by an "off the record discussion." Moreover, between July 16 and August 23, Sanfilippo had talked with his business partner about the matter and had then clearly recalled that Exhibit 6 had not been received until 1953. Mr. Sanfilippo's recollection, which had first come to him in an off-the-record discussion on July 16 and had subsequently become clear after a discussion with his partner, was thus well established before the August 23, 1956, meeting between the witness and the agents. Petitioner now contends that, as a result of the trial court's denial of production of the agents' memorandum with respect to the August 23 meeting (Court's Ex. 2), he was prevented from ascertaining what went on at the August 23 meeting which caused the witness to have a refreshed recollection about Exhibit 6 (Br. 12). But, as we have shown above, the agents' memorandum of the August 23, 1956, meeting could not reflect any "change in the witness' position as to Exhibit 6" (Br. 11), since Sanfilippo had already arrived at his refreshed recollection before he appeared at the

testimony as well as his prior statements showed a most ample and generous consideration of the defendant's rights. Under these circumstances, we submit that the judge's action did not transcend the limits of sound discretion. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 234.

In considering the need of defense counsel for Court's Exhibit 2 to cross-examine Mr. Sanfilippo, it should be borne in mind not only that he was the brother-in-law of the defendant, whom he had advised for years and whose books with respect to real estate operations he was still keeping at the time of trial (Tr. 274, 347), but also that Mr. Sanfilippo was shown to have cooperated fully with the defense throughout the investigation. Thus, prior to Sanfilippo's interview with the Internal Revenue agents on July 16, 1956, in answer to a summons to testify regarding petitioner's case, he met with petitioner's office of the Internal Revenue Service on August 23, 1956, to sign his original statement and to execute the supplemental affidavit.

Furthermore, it is difficult to understand how Mr. Sanfilippo could be impeached by any statement he could have made as to the relation of Exhibit 6 to petitioner's 1951 tax return (Br. 9) or by any showing of "a failure of communication between the partners in the accounting firm" regarding Exhibit 6 (Br. 9), since Sanfilippo was admittedly not present when the 1951 tax return was prepared (Br. 9), being absent from New York City from January through April 1952 (R. 167). All of the information which went into that tax return was gathered by Mr. Amoruso, his partner, and the latter testified that he did not see the Steiner, Rouse form (Ex. 6), revealing individual items of dividends on personally held stock, at the time he was preparing petitioner's 1951 return (R. 209). Indeed, Mr. Amoruso testified that he had secured the figures (aggregating \$3,800), used on the tax return for dividends on personally held stock for 1951, from petitioner (R. 196-197).

counsel (Tr. 575, 779-782, 932). Thereafter, when Mr. Sanfilippo, on August 23, 1956, had signed his statement given under oath to the Internal Revenue Service (Ex. Y-7) and had received a copy of it, he furnished the copy to petitioner's counsel (Tr. 932-934; Ex. 634). The question-and-answer statement of the Sanfilippo partner, Mr. Amoruso, had also been furnished defense counsel prior to trial (Ex. 634). Mr. Sanfilippo had two conferences with petitioner's counsel prior to trial (Tr. 575-576, 949) as did Mr. Amoruso (R. 210-211, 235-236, 252, 256, 259, 263, 269). Mr. Sanfilippo had also, prior to trial, turned over to defense counsel the Steiner, Rouse form (Ex. 6) (see Ex. 634). Defense counsel also had possession of, and used prior to trial, the Sanfilippo firm's workpapers pertaining to petitioner's return (R. 235, 254, 279, 311-312, 363).

This is not a case in which we seek a ruling of harmless error (if there was error at all) *in vacuo*. It is highly significant that Court's Exhibit 2, the particular document at issue, was actually examined by both courts below and has been certified to this Court, together with the voluminous pretrial statements of the witness which were furnished to defense counsel. Examination of Court's Exhibit 2 will reveal that it is merely cumulative and repetitious.¹⁴ Denial of production under these circumstances was not prejudicial to any substantial rights of petitioner. *Lawn v.*

¹⁴ In the Court of Appeals, the Government made the following comparison in its brief (p. 27) between Court's Exhibit 2, not furnished to the petitioner, and the actual pre-trial statements of Sanfilippo which were furnished to the petitioner:

"It [Court's Ex. 2] referred to the following matters:

United States, supra; Gordon v. United States, 344 U.S. 414, 423.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

J. LEE RANKIN,

Solicitor General.

CHARLES K. RICE,

Assistant Attorney General.

JOSEPH F. GOETTEN,

LAWRENCE K. BAILEY,

Attorneys.

APRIL 1959.

"(1) The kind of records and information submitted by Palermo to Sanfilippo and his firm and the occasion of these submissions.

This subject was covered by pages 7, 9, 18, 24, 26, 29, 31, and 32 of Exhibit Y-7 and at pages 14-15 of the grand jury testimony (Exh. W-7).

(2) The subject of Palermo's diary.

This topic was discussed in both the question and answer statement (Exh. Y-7, page 16) and the grand jury testimony (Exh. W-7, page 5).

(3) The keeping of records by Sanfilippo pertaining to Palermo's real estate and fees received therefor.

This was mentioned at page 10 of Exhibit Y-7 and at page 2 of Exhibit W-7.

(4) The role of Sanfilippo's firm in preparing Palermo's income tax returns.

This came up on a number of occasions during the questioning of Sanfilippo by the Special Agents (Exh. Y-7, pages 23, 24, 34 and 40), and the witness gave additional testimony about it before the grand jury (Exh. W-7, pages 4, 7 and 21). None of the matter stated in Court Exhibit 2 on these subjects is inconsistent in any material way with either Sanfilippo's grand jury testimony or his statements to the Internal Revenue Service which were furnished to, and used by, defense counsel in cross-examination."

APR 27 1959.

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 471

ANTHONY M. PALERMO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

REPLY BRIEF FOR THE PETITIONER

**WYLLYS S. NEWCOMB,
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IN THE

Supreme Court of the United States

October Term, 1958

No. 471

ANTHONY M. PALERMO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

REPLY BRIEF FOR THE PETITIONER

Statement

In order that there may be a sound basis for the proper determination of the instant case by this Court, it is necessary to point out certain factual inaccuracies set forth in the government's brief.

1. The government repeatedly states that Court's Exhibit 2 was examined by the trial court (Gov't Br. 17, 20, 28). Such was not the case (R. 159, Tr. 789-803).*

2. The government states that "there was no testimony" to the effect that "the Steiner, Rouse form [Gov't Ex. 6] was passed back and forth between the petitioner and the Sanfilippo firm" (Gov't Br. 25, fn. 12). Presumably the government is suggesting that, since in its final form Government's Exhibit 6 included entries relating to the year 1952 as well as the year 1951, it must have re-

* As is pointed out in the government's brief (p. 6, fn. 1) the full trial record is before this Court. References to the full trial record are prefixed "Tr."

mained in petitioner's possession until some time in 1953. There was specific testimony establishing directly that Government's Exhibit 6 was delivered to the accounting firm in early 1952 (R. 288-291, 293) and the firm, of course, had it again in 1953 since it was used in preparing the 1952 return (R. 31, 288) and returned it to petitioner. There was moreover an abundance of evidence, wholly uncontradicted, establishing a regular course of dealing between petitioner and the accounting firm, pursuant to which business records, statements, checks, brokerage accounts and other documents were delivered back and forth between petitioner and his accountants. This was established by the testimony of Sanfilippo, Amoruso, James Pollaci (who often acted as petitioner's messenger), and many of the clerical and accounting employees of the Sanfilippo firm and has never been contested by the government.

In other words, delivery of Government's Exhibit 6 to the accounting firm early in 1952, for use in connection with the preparation of petitioner's 1951 return, was in no way inconsistent with the fact that Government's Exhibit 6, in its final form, contained entries relating to the year 1952.

POINT I

18 U. S. C. 3500 is properly before this Court (answering Gov't Br. Point I, particularly p. 17 and fn. 9 on pp. 18-19).

On the basis of an alleged concession, claimed to have been made by defense counsel upon the trial, the Government seeks to invoke an estoppel or waiver. It is thus asserted that the petitioner is prevented in this Court "from being heard" to say that inspection should have been granted under Section 3500.

The government's position is apparently based upon an erroneous conception of what occurred on the trial. On

this particular point the printed Transcript of Record is incomplete. Once the full trial record is examined, it clearly appears that there is no merit to the government's contention.

A. In the Trial Court.

(1) Prior to the occasion when petitioner's application to inspect Government's Exhibit 2 was made, both Section 3500 and the decision of this Court in *Jencks* had been discussed, argued and reviewed in other connections, not material here (Tr. 27-29, 50-57, 408-33, 465-86, 545, 577);

(2) Upon the making of the application, both the trial court and counsel for the Government at once construed it as invoking Section 3500 (Tr. 786-789) and discussed the problem in terms of that statute. No disavowal or concession was made by counsel for petitioner.

Thus (Tr. 786):

"THE COURT: I thought we had gotten away from the *Jencks* case, and I left my copy of the new statute upstairs.

MR. NEWCOMB: We have one here, your Honor."

And (Tr. 788):

"MR. McHUGH: May it please the Court, first of all, let me say that Section 3500 of Title 18, as I understand it, provides that the statement of a witness is to be given to defense counsel only under certain limited circumstances * * * "

And by Mr. McHugh (Tr. 788):

"It is our position that the memorandum of the conference which was made by Agent Harper * * * is clearly not within the *Jencks*, so-called, statute, Section 3500."

(3) The trial court, before any alleged "concession" by defense counsel, clearly indicated that it (the trial court) was of the opinion that petitioner was not entitled to relief

under the statute and that, if pressed under the statute, the application would be denied (Tr. 786-789):

Thus, referring to Section 3500 (Tr. 786-787):

"THE COURT: But at the start, as I recall the statute, you are not within 100 miles of it, are you?"

(4) Even after the alleged concession, counsel for the petitioner specifically argued that, if construed to prohibit the inspection sought, Section 3500 was unconstitutional (Tr. 797-797a);

B. In the Court of Appeals.

(5) Petitioner not only raised the point in the Court of Appeals but made it one of the principal grounds of the appeal (Br., Ct. App., 31-35);

(6) In the Court of Appeals the government made no claim of waiver or estoppel, joined issue on the point and fully contested it (Gov't Br., Ct. App., 21-24);

(7) The Court of Appeals not only passed upon the point but devoted the greater portion of its opinion to the point (258 F. 2d 397, at 398-399; R. 427-428).

The Court specifically held (258 F. 2d 397, at 398; R. 427):

"We do not agree with defendant's contention that under the provisions of Section 3500 the memorandum should have been made available to him."

C. In This Court.

(8) In the petition for a writ of certiorari to this Court six out of the nine stated "Question Presented" referred to Section 3500 and in four of them petitioner asserted that he was entitled to inspection under that statute (Pet. Cert. 2-4); and

(9) In opposing petitioner's application for a writ of certiorari the Government did not claim either estoppel or

waiver; on the contrary, the Government joined issue and contested it (Gov't Br. opp. cert. 7-9).

Based upon the whole record, it is submitted that the position of the Government is neither just nor sound. *Friend v. Talcott*, 228 U. S. 27 (1913); *Jencks v. United States*, 353 U. S. 657 (1957).

Viewed in its proper context and upon the whole record, the alleged "concession" by defense counsel constituted nothing more than a graceful act of deference to a clearly indicated adverse ruling by the trial court. "Nothing goes further to disturb the proper atmosphere of a trial than reiterated insistence upon a position which the judge has once considered and decided." *Keen v. Overseas Tankship Corp.*, 194 F. 2d 515, 519 (2 Cir. 1952), cert. den. 343 U. S. 966 (1952).

POINT II

There must be a new trial (Answering Gov't Point II; Gov't Br. 22-29).

Invoking the so-called "harmless error" doctrine, the government contends that even if the trial court erred in denying petitioner's motion to inspect the statements of Sanfilippo as recorded in Court's Exhibit 2 the conviction should nevertheless be affirmed. It is respectfully submitted that the government's position is not well taken.

1. Rationale of Jencks.

Basic in the reasoning upon which the decision in *Jencks* was rendered is the proposition that in a criminal case only the defendant's counsel is in a position to determine the value, importance or significance of the prior statements made by a government witness and the use, if any, to be made of them on defendant's behalf. Thus this Court said (at pp. 668-669):

"We hold, further, that the petitioner is entitled to inspect the reports to decide whether to use them in his defense. Because only the defense is adequately equipped to determine the effective use for purpose of discrediting the Government's witness and thereby furthering the accused's defense, the defense must initially be entitled to see them to determine what use may be made of them. Justice requires no less."

The test is that of relevancy and materiality. If the statement relates, as here, to the subject matter of the witness' trial testimony for the government, justice requires not that the statement be admitted in evidence, not that the defense be permitted to use the statement, but that the defense be permitted to see the statement. The vital right is of the defendant, through his counsel, to inspect the prior statement.

Recognition by this Court that it is the right to inspect that governs, as distinguished from the admissibility or usefulness of the document in question, is made unmistakably plain in *Jencks*. There, this Court quoted from the opinion of Mr. Chief Justice Marshall in *United States v. Burr*, 25 Fed. Cas. 187, and then stated (at p. 688, fn. 14):

"What is true before the case is opened is equally true as the case unfolds. The trial judge cannot perceive or determine the relevancy and materiality of the documents to the defense without hearing defense argument, after inspection, as to its bearing upon the case."

This Court then went on to say (at p. 669):

"Relevancy and materiality for the purposes of production and inspection, with a view to use on cross-examination, are established when the reports are shown to relate to the testimony of the witness. Only after inspection of the reports by the accused, must the trial judge determine admissibility * * *"

It is no answer to say that the contents of the statements were merely "cumulative", nor for government

counsel to speculate as to what might or might not have been the outcome, had the fundamental right of the defendant been granted.

Unless defense counsel has had the opportunity both to inspect and be heard, we respectfully suggest that neither this Court, nor the Court of Appeals, nor the District Court, nor government counsel is in a position fairly to determine whether the statements of Sanfilippo as recorded in Court's Exhibit 2 are "cumulative" or not. The doctrine for which the government contends would violate the most fundamental concepts of justice and fair play. It would require petitioner to analyze and expound the refinements, niceties and details of a document he has never been permitted to see.

Fortunately for the petitioner the fact that the statements were not merely cumulative and the further fact that the error was highly prejudicial can readily be demonstrated. But the point is that if the requirements of the statute or of *Jencks*, or both, are met and it is shown that the subject matters of the statement were important, a conviction cannot stand.

It was on this basis that *Jencks* struck down the requirement that there be a preliminary showing of inconsistency. This Court said (353 U. S. at 667):

"Requiring the accused first to show conflict between the reports and the testimony is actually to deny the accused evidence relevant and material to the defense."

No better illustration of the necessity for inspection could be found than that afforded by the record in the instant case. We have set out in Appendix "A" annexed to this brief successive, limited revelations as to Court's Exhibit 2 made by the government at the various stages of the instant case.

2. The Denial of Petitioner's Motion to inspect was highly prejudicial and constituted reversible error.

The government has admitted that Government Exhibit 6 (the Steiner, Rouse form containing notations in the petitioner's hand of dividends received by him in 1951 and 1952) is one of the matters referred to in Court's Exhibit 2 (Sanfilippo's statements to Special Agent Harper at the August 23, 1956 conference, as recorded by Harper).

We read *Jencks* as not requiring the defense to show prejudice.* But if prejudice is required, it can be shown here.

By the end of the trial five different stories had been placed in the record as to the time and circumstances of the delivery of Government's Exhibit 6 to the Sanfilippo firm. Four of these stories came from Sanfilippo himself. Each depended solely upon his unsupported word; there was no corroborative evidence whatever.

The fifth story (in point of time) came from a disinterested witness, a former employee of the Sanfilippo firm who was called by the government, and that story was substantially supported by circumstantial evidence (R. 288-293, Gov. Ex. 6; Exs. CCC, D, J).

A. Story Told by a Disinterested Witness

Mrs. LaCombe stated that when she was working in Sanfilippo's office in early 1952 on the petitioner's 1951 return, she used Government's Exhibit 6, which at that time had entries for dividends received by the petitioner in 1951 (R. 290-291). An examination of Government's Exhibit 6 will reveal certain pencilled notations alongside each entry for 1951, all in Mrs. LaCombe's handwriting. As the face of the exhibit shows, her notations appear for all entries for 1951, and only those entries. She testified, among other

* None of the cases cited by the government are in point or persuasive (see, Gov't Br. 10-11).

things, that she made these notations early in 1952 in connection with preparation of the 1951 return (*Ibid.*). There was no evidence that Mrs. LaCombe ever had any other occasion for working only on the 1951 entries on Government's Exhibit 6.*

B. The Four Stories Told by Sanfilippo

(1) On July 19, 1953, Sanfilippo testified under oath to Special Agent Harper (Ex. Y-7, pp. 32-33):

"I do not know * * * I have no recollection * * * I can not account for" ~~Court's Exhibit 2.~~ Gov't Ex. 6.

(2) On August 23, 1953, Sanfilippo swore (R. 152):

"*It appears* from examination of the Steiner, Rouse form [Exhibit 6] and photostatic copies of Dr. Palermo's tax returns for 1951 and 1952 that I received this form * * * from Dr. Palermo after Revenue Agent Mishler had commenced his examination of Dr. Palermo's returns * * * *I believe* that Dr. Palermo supplied me with this form * * * at that time." (Italics supplied).

(3) At the trial Sanfilippo stated on direct examination (R. 27):

"Q. I show you Government's Exhibit 6 for identification and ask you to tell the Court and jury if you have seen that before? A. Yes.

Q. When did you first see it? A. During the course of the tax examination of Mr. Mishler in 1953.

Q. Who gave it to you? A. The defendant."

* The government has attempted to disparage this testimony (Gov't Br. 25, fn. 12). It is of note that the statements made by the government in its brief are taken from assertions made by government trial counsel; and are not supported by evidence. A fair reading of Mrs. LaCombe's entire testimony (Tr. 1256-1282) shows that it was positive and clear, and that the efforts by government trial counsel to shake it were unsuccessful.

(4) Sanfilippo's fourth version went even further: he set the purpose, as well as the time, of his receipt of Government's Exhibit 6 by stating (R. 81):

"In other words * * * all I can say is that it [Government Exhibit 6] was given to us for a certain purpose, and namely the purpose was to get corrected figures concerning his dividends as requested by the revenue agent, Mr. Mishler."

It will readily be seen that each of these four stories was progressively more damning to the petitioner, and the fourth and last was the most incriminating of all.

Sanfilippo's fourth version was false. If that version were true, the earliest time at which Sanfilippo could have received Government's Exhibit 6 was sometime in April, 1953. This was established by uncontroverted evidence that: (a) the request by Revenue Agent Mishler was made at a meeting in Sanfilippo's office, and not on any other occasion (R. 82, 125-127); and (b) that Revenue Agent Mishler's first visit to Sanfilippo's office was on April 17, 1953 (*Ibid.*), a full month after petitioner's 1952 return was filed on March 16, 1953 (R. 7, Tr. 6). Yet the overwhelming evidence, which included Sanfilippo's own admission, established conclusively that Government's Exhibit 6 was used in the preparation of the 1952 return (R. 31, 288; Tr. 1967-2028).

The time when and the circumstances under which Government's Exhibit 6 was first received by the accounting firm constituted the heart of the case. Sanfilippo told four different stories about it, each more damning to the defense than its predecessor. The last was absolutely false. The conference of August 23, 1956 was a crucial stage in the evolution of Sanfilippo's false testimony. Yet petitioner was denied access. If that denial was error, there must be a reversal.

IV.

CONCLUSION

The conviction must be reversed and a new trial ordered.

Respectfully submitted,

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APPENDIX A

Information Supplied by the Government on Court Exhibit 2

A. The Trial Record.

Mr. McHugh stated (Tr. 789):

"There are no quotes in that memorandum, and, if the Court wishes, I will hand the memorandum to the Court to show you that it is merely a hearsay report of Harper of the conference had with Mr. Sanfilippo on or about August 23rd."

Thereafter he stated (Tr. 800):

"But here we are faced with something entirely different: a document that is merely the impression or recollection of Agent Harper of what this witness may have said to him at one time or another. * * *"

B. The Government Brief to the Court of Appeals.

In its first point the Government stated (pp. 20-21):

"This memorandum relates to a conference Special Agent Harper of the Internal Revenue Service had with Mr. Sanfilippo at the time he read and signed his testimony of July 16, 1956 and executed his affidavit of August 23, 1956, copies of which documents were given to defense counsel. It is apparent from the face of this exhibit that the conference took over two hours. The memorandum does not purport to be a transcript or even a complete summary of everything that was said by the witness during that meeting. It is also apparent from the face of the document that it was not prepared by Agent Harper until some hours after the conclusion of the conference (Court Exh. 2, pp. 1, 4)."

It also stated (p. 22):

"Obviously the memorandum of conference prepared by Agent Harper was not a contemporaneous

report. It was simply his summary of what transpired, intended for the internal use of his office. This document does not purport to be a 'substantially verbatim' account of what Sanfilippo said nor does it quote him in any way."

Under its second point, the Government stated (p. 27):

"It referred to the following matters:

"(1) The kind of records and information submitted by Palermo to Sanfilippo and his firm and the occasion of these submissions.

"This subject was covered by pages 7, 9, 18, 24, 26, 29, 31 and 32 of Exhibit Y-7 and at pages 14-15 of the grand jury testimony (Exh. W-7).

"(2) The subject of Palermo's diary.

"This topic was discussed in both the question and answer statement (Exh. Y-7, page 16) and the grand jury testimony (Exh. W-7, page 5).

"(3) The keeping of records by Sanfilippo pertaining to Palermo's real estate and fees received therefor.

"This was mentioned at page 10 of Exhibit Y-7 and at page 2 of Exhibit W-7.

"(4) The role of Sanfilippo's firm in preparing Palermo's income tax returns.

"This came up on a number of occasions during the questioning of Sanfilippo by the Special Agents (Exh. Y-7, pages 23, 24, 34 and 40), and the witness gave additional testimony about it before the grand jury (Exh. W-7, pages 4, 7 and 21). None of the matter stated in Court Exhibit 2 on these subjects is inconsistent in any material way with either Sanfilippo's grand jury testimony or his statements to the Internal Revenue Service which were furnished to, and used by, defense counsel in cross-examination."

C. The Government Brief in Opposition to the Petition for Certiorari.

The Government said (pp. 6, 7-8, 9):

"Some hours after the meeting was over, the agents made a memorandum of what took place at this August 23, 1956, meeting (See Court's Ex. 2, pp. 1, 4).

"It is not disputed that the agent's memorandum (Court Ex. 2) was not signed, approved or otherwise adopted by the witness. As the court below said (Pet. 15), it is quite apparent from the record that the memorandum was made from memory; that it was merely a summary of the agent's recollection, and that it does not appear that the memorandum was a transcript of notes made at the interview. As is apparent from the face of the memorandum, it does not purport to be a transcript or even a complete summary of what was said by the witness during the meeting; and it was not prepared until some hours after the conference. (Court Ex. 2, pp. 1, 4.)

"The petitioner does not show how failure to provide a defendant with a Government agent's memorandum of the agent's recollection from memory of what had taken place at a meeting with the witness could deprive petitioner of any constitutional right. The memorandum is hearsay as to the witness. There is no recognized rule of evidence under which the petitioner would be entitled as of right to such a document, consisting only of notes or a memorandum made by a third party which the witness has not adopted as his own statement or which the evidence does not show to be in fact his own statement."

D. The Government Brief to the Supreme Court.

The Government said (p. 10):

"Some time after the conclusion of this meeting with Mr. Sanfilippo on August 23, 1956, the Internal Revenue agents made a memorandum of the meet-

ing, which was placed in the files of the Service (R. 426-427)."

And thereafter (p. 16):

"Under the statutory procedure, a summary of prior oral statements prepared by the Government agents, and which has not been approved by the witness, is not a 'statement' which must be produced for cross-examination of such witness. As the Court of Appeals held, and as the description of the document itself clearly indicates, Court's Exhibit 2 is such a summary."

In its argument, the Government said (p. 21):

"The memorandum, consisting of only *fifty-five type-written lines*, relating to a conference which the heading indicates lasted *three and one-half hours*, is obviously not a substantially verbatim recording. Nor was it approved or adopted in any manner by Government witness Sanfilippo; it was signed only by Agent Harper, sometime after the conference, and later by Agent McGowan. It is merely their summarized version of prior oral statements. Under the legislative standards established in the 'Jencks' Act, it is not fairly attributable to Government witness Sanfilippo, and not subject to compulsory production." (Italics in the original).

And thereafter (p. 24):

"These other statements were more reliable, being the actual verbatim statements of the witness; they were also equally close in point of time to the events to which they relate; moreover, they had the additional quality of being given under oath, whereas the agent's summary (besides being hearsay as to the witness) was not so made."

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1958

No. 471

ANTHONY M. PALERMO,

Petitioner,

v.

UNITED STATES OF AMERICA.

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

PETITION FOR REHEARING

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1958

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ANTHONY M. PALERMO,

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v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE SECOND CIRCUIT.

PETITION FOR REHEARING

Petitioner, on the grounds hereinafter stated, petitions for rehearing of this Court's decision of June 22, 1959, which affirmed the judgment of conviction entered against the petitioner (a physician practicing in New York) for wilful attempted income tax evasion for the years 1950, 1951 and 1952.

Mr. Justice Frankfurter delivered the majority opinion of the Court. In a separate opinion by Mr. Justice Brennan, with whom Mr. Chief Justice Warren, Mr. Justice Black and Mr. Justice Douglas joined, these four Justices concurred in the result but disagreed strongly with the majority's interpretation of the so-called "Jencks Act", 18 U.S.C. (Supp. V) § 3500 and took issue with the major-

ity's position that the "Jencks Act" was meant to be exclusive.

This petition for rehearing is filed within the time prescribed in Rule 58 (1) of the Rules of this Court and is made pursuant to the provisions of the said Rule.

There has been a change of attorneys for the petitioner herein. By stipulation, Robert R. Kaufman, Esq., was duly substituted in place of the petitioner's former attorneys, Wyllys S. Newcomb and John A. Wells, Esqs. Upon this petition for rehearing and upon the motion for stay of mandate filed contemporaneously therewith, the petitioner is represented by Robert R. Kaufman, Esq., as his attorney, and by Rudolph Stand, Esq. (a member of the bar of the Supreme Court of the United States), as associate counsel for the petitioner.

Grounds for Granting Rehearing

A rehearing of this case is respectfully prayed by the petitioner upon the grounds following:

FIRST: That the so-called "Jencks Act" 18 U.S.C. (Supp. V) § 3500 has received a broad and sweeping construction not in consonance with its language, its legislative history and its constitutional limitations.

SECOND: That the Court has overlooked material points and decisive authorities duly submitted by counsel upon the argument of the appeal, namely, that the purpose of Congress was only to check "extravagant interpretations" of the *Jencks* decision while reaffirming the fundamental *Jencks* principle of assuring the defendant a fair trial without which due process of law under the Fifth Amendment to the Constitution cannot exist.

THIRD: That the Court has overlooked the inevitable and logical consequences which must flow from the deci-

sion already rendered in the case at bar. The law as now laid down by this Court holding that the "Jencks Act" and not the *Jencks* decision (*Jencks v. United States*, 353 U. S. 657) governs exclusively the production of statements of government witnesses for a defendant's inspection at trial raises grave constitutional problems under the Fifth and Sixth Amendments to the Constitution.

It is proper to say that in presenting this petition for a rehearing we have clearly in mind that petitions for rehearing, especially after decision on the merits, are not favored and are seldom granted.² In view, however, of our belief that the Court has overlooked controlling decisions of this Court and in view of the far-reaching importance of the questions herein involved in the administration of federal criminal justice, we feel that we are well justified in further occupying the time of the Court with a consideration of this case. We do not file this petition simply to satisfy a desire to argue once more the very questions which have already been submitted and which have been decided by the Court.

The Court, in declaring in its majority opinion (p. 8) that:

"The purpose of the Act, [§ 3500 of the Criminal Code, 18 U.S.C.] its fair reading and its overwhelming legislative history compel us to hold that statements of a government witness made to an agent of the Government which cannot be produced under the terms of 18 U.S.C. § 3500 cannot be produced at all."

has, we very respectfully submit, overlooked the views of the minority opinion (p. 2) which contains this passage:

"Congress had no thought to invade the traditional discretion of trial judges in evidentiary matters beyond checking extravagant interpretations of our decision in *Jencks v. United States*, 353 U. S. 657, which were said to have been made by some lower courts.

Indeed Congress took particular pains to make it clear that the legislation 'reaffirms' that decision's holding that a defendant on trial in a criminal prosecution is entitled to relevant and competent reports and statements in possession of the Government touching the events and activities as to which a government witness has testified at the trial * * *. Certainly nothing in the statute or its legislative history justifies our stripping the trial judge of all discretion to make nonqualifying reports available in proper cases.

* * *

The facts are sufficiently set forth in the statement of the case (Petitioner's Brief, pp. 5-14). It is abundantly clear therefrom that Arthur R. Sanfilippo, an important government witness and the principal partner in the accounting firm which had prepared and filed the petitioner's income tax returns for upwards of twenty-five years was the government's main witness. The basic framework of the evidence against the petitioner rested completely upon his testimony. Sanfilippo had been questioned on a prior occasion by the government agent on exactly the same subject matters covered by his testimony given at the trial. Within a few hours after this conference with this witness, the agent had made a detailed memorandum in which, without direct quotation, he set forth the substance of what the witness said to him on the subject matters in question. During the cross examination of Sanfilippo, petitioner's counsel moved for an order directing the government to permit him to inspect those portions of the memorandum in which the agent had recorded the substance of what the witness had said as to the same subject matters.

The petitioner contended that the inspection sought by him upon the trial was expressly within the scope and meaning of 18 U.S.C. § 3500; that the said statute was not intended to and does not prohibit inspection of the

substance of an oral statement made by a government witness to a government agent relating to the same subject matters as were testified to by the witness upon the trial even though the statement be held not to have satisfied in all respects the requirements of the new statute.

The petitioner further urged that the inspection sought below should clearly have been granted on the authority of *Jencks v. United States, supra*, and if the statute was construed and applied as to prohibit inspection under the circumstances presented by the record, such statute deprived the petitioner of due process of law and is violative of the Fifth Amendment.

It must be borne in mind that the "Jencks" Act was so called because it was enacted to prevent possible damage to national security following this Court's decision in *Jencks v. United States, supra* (a non tax case) holding that the defense was entitled to obtain for impeachment purposes on cross examination, statements which had been made by two paid undercover agents for the F.B.I., who stated that they had made reports to the F.B.I. on the matters about which they had testified. Jencks, a labor union leader, was charged with filing a false affidavit that he was not a member of the Communist Party or affiliated with such Party. The Government's principal witnesses were Communist Party members paid by the Federal Bureau of Investigation to make reports of Communist Party activities in which they participated.

The doctrine and rationale of the *Jencks* case that a defendant on trial should be entitled to statements helpful in the cross examination of government's witnesses who testify against him did not announce any new principle of law. The *Jencks* rule was designed solely to facilitate proper cross examination. It is an elementary proposition that cross examination is a weapon, with which a defendant defends himself against the prosecution, and he is entitled to use it upon the witnesses, to test their credibility.

Nevertheless, the *Jencks* decision precipitated a storm of controversy because of the claim that it would force the F.B.I. and other governmental agencies to open their secret files at the demand of any defendant in a criminal case and was, therefore, a threat to the country's security. On the other hand, critics of the "*Jencks Act*" maintained that it places too many unjust restrictions on their right to try to discredit their accusers.

In the case at bar no claim was made that the statement demanded by defense counsel was privileged against disclosure on grounds of national security, state secrets, confidential character of the report, public interest or otherwise.

Cross examination is a matter of right. It is the essence of a fair trial. Counsel cannot know in advance what pertinent facts may be elicited on cross examination. For this reason it is necessarily exploratory. Denial of reasonable latitude in this respect is reversible error (*Alford v. United States*, 282 U. S. 687, 691-694).

The common law judges and lawyers for two centuries past have regarded the opportunity of cross examination as an essential safeguard of the accuracy and completeness of testimony, and they have insisted that cross examination is a distinctive and vital feature of our law (5 *Wigmore on Evidence*, § 1367 (3rd Ed.)).

The first, and probably the most effective and most frequently employed line of attack upon the credibility of a witness, is by proving that the witness on a previous occasion has made statements inconsistent with his present testimony. "It seems wise to stand firm upon ordinary considerations of fairness, and to hold that the prosecutor is not entitled at the trial to withhold from the inspection of the accused and the jury any documents * * * relevant to the case" (8 *Wigmore on Evidence*, § 2224 (3rd Ed.)).

The principle stated by Judge Cooley in *People v. Davis*, 52 Mich. 569, 573, quoted with approval in *Gordon v. United States*, 344 U. S. 414, 419, is equally appropriate here:

"The state has no interest in interposing any obstacle to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons. * * * If there shall be in the possession of any of its [the State's] officers information that can legitimately tend to overthrow the case made for the prosecution, or to show that it is unworthy of credence, the defense should be given the benefit of it."

A trial ought not to be regarded as a mere contest or game of skill between opposing counsel. "The right to fair trial is the right that stands guardian over all other rights." (*Dennis v. United States*, 339 U. S. 162, 173.) A fair trial is in all of the decisions of this Court declared to be one of the conditions without which due process of law cannot exist (*Ong Chang Wing v. United States*, 218 U. S. 272, 279, 280; *Hill v. Texas*, 316 U. S. 400, 406).

In *Anti-Fascist Committee v. McGrath*, 341 U. S. 123, Mr. Justice Frankfurter, in a concurring opinion, said, at pages 162-163:

"The requirement of 'due process' is not a fair-weather or timid assurance. It must be respected in periods of calm and in times of trouble; it protects aliens as well as citizens. But 'due process', unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound

attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process."

As Mr. Justice Brennan suggested in the minority opinion, the majority's interpretation of the statute may encourage "a practice of government agents taking statements in a fashion calculated to insulate them from production" (p. 6). Such practice would not be conducive to a fair trial which is the basic principle of the *Jencks* case.

In the *Jencks* case, the Court declared (pp. 667-8) that the interest of the United States in a criminal prosecution is not that it shall win a case, but that justice shall be done.

Justice cannot be done, if, as stated in the minority opinion at page 6:

"There inheres in an overrigid interpretation and application of the statute the hazard of encouraging a practice of government agents' taking statements in a fashion calculated to insulate them from production."

In an address at the Columbia Law Review dinner, Mr. Justice Douglas, in April 1959, said:

"Procedural due process gives protection to the citizen against overreaching officials. Abuse of power by government is an ancient evil. Those who drafted the Constitution and Bill of Rights had personal ex-

perience with attorneys general, public prosecutors, and even judges who were willing to take shortcuts to carry out the will of a king. Our forefathers knew that a majority in a democratic society could be as tyrannical as any king. So these procedural safeguards were interposed to prevent overreaching by officials, to immunize trials from public hysteria, to make the public trial in America a calm objective affair, not a spectacle."

These words are equally applicable here, in the light of the tenor of the minority opinion and the compelling logic of this statement at pages 2-3:

"Even the Government, in oral argument, conceded that the statute did not strip the district judges of discretion to order production of such a statement under some circumstances. There is an obvious constitutional problem in an interpretation that the statute restrains the trial judge from ordering such a statement produced. Less substantial restrictions than this of the common-law rights of confrontation of one's accusers have been struck down by this Court under the Sixth Amendment. See *Kirby v. United States*, 174 U. S. 47. And in such circumstances, there becomes pertinent the command of that Amendment that criminal defendants have compulsory process to obtain witnesses for their defense. See *United States v. Schneiderman*, 106 F. Supp. 731, 738. It is true that our holding in *Jencks* was not put on constitutional grounds, for it did not have to be; but it would be idle to say that the commands of the Constitution were not close to the surface of the decision; indeed, the Congress recognized its constitutional overtones in the debates on the statute."

CONCLUSION

For the reasons assigned herein, the petitioner respectfully prays that his petition for rehearing be granted.

Respectfully submitted,

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Certificate of Counsel.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

RUDOLPH STAND,
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